In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-640

DWIGHT GEDULDIG,

Appellant,

v.

CAROLYN AIELLO, individually and on behalf of all others similarly situated,

Appellees.

DWIGHT GEDULDIG,

Appellant,

v.

AUGUSTINA D. ARMENDARIZ, ELIZABETH B. JOHNSON, JACQUELINE JARAMILLO, individually and on behalf of all other women similarly situated,

Appellees.

CONSOLIDATED CASES ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DOCKETED OCTOBER 12, 1973
JURISDICTION NOTED DECEMBER 17, 1973

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DOCKET ENTRIES

Date 1972	Proceedings (No. C-72-1402 SW)
July 31	Filed Complaint for Injunctive and Declaratory Relief, issued summons
Oct. 25	Filed Order Designating United States Circuit Judge and United States District Judges Pursuant to 2284, Title 28, USC
Dec. 5	Filed Order Consolidating C-72-1402 SW and C-72-1547 SW
27	Filed Consolidated Complaint for Injunctive and Declaratory Relief
1973	
Jan. 10	Filed Notice of Motion and Motion for Summary Judgment
12	Filed Petition in Intervention for Writ of Mandamus and for Injunctive and Declaratory Relief; Memorandum of Points and Authorities
18	Filed Answer to Consolidated Complaint
31	Filed Notice of Motion; Motion to Dismiss Complaint; Memorandum of Points and Authorities
31	Filed Plaintiffs' Supplemental Memorandum
Feb. 20	Filed Plaintiffs' Reply to Defendant's Memorandum of Law
Feb. 21	Filed Affidavit of William D. Smith
May 31	Filed Opinion signed by Judge Ben C. Duniway and Judge Alfonso J. Zirpoli and Dissent by Judge Spencer Williams
June 15	Filed Order Granting Plaintiffs' Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment signed by Judge B. C. Duniway and Judge Alfonso J. Zirpoli
21	Filed Motion to Reconsider and Set Aside Summary Judgment

Date 1973	
July 9	Filed Memorandum of Points and Authorities in Opposition to Motion to Reconsider and Set Aside Summary Judgment
23	Filed Motion to Stay Injunction Pending Hearing on Motion for Reconsideration
27	Filed Motion for Stay of Execution Pending Hearing on Motion for Reconsideration
27	Filed Reply to Opposition to Motion to Reconsider
Aug. 7	Filed Memorandum by Judge Spencer Williams
7	Filed Order Denying Motion to Reconsider Judgment, signed by Judge Ben C. Duniway and Judge Alfonso J. Zirpoli
Aug. 13	Filed Notice of Appeal to the United States Supreme Court
16	Filed Notice of Motion; Motion for Stay; Memorandum of Points and Authorities
16	Filed Notice of Substitution of Party Defendant
24	Filed Memorandum of Points and Authorities in Opposition to Motion for Stay
Sept. 10	Filed Order Denying Motion for Stay Pending Appeal

In the United States District Court
for the Northern District of California

CAROLYN AIELLO, individually and on behalf of all others similarly situated, *Plaintiff,* vs. SIGURD HANSEN, as Director of the State Department of Human Resources Development, *Defendant.*	Civ. No. C-72-1402 SW
AUGUSTINA D. ARMENDARIZ, ELIZABETH B. JOHNSON, JACQUELINE JARAMILLO, et al., individually and on behalf of all other women similarly situated, *Petitioners,* vs. SIGURD HANSEN, as Director of the State Department of Human Resources Development, *Respondent.*	Civ. No. C-72-1547 SW

CONSOLIDATED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF (Civil Rights)

I

PRELIMINARY STATEMENT

Plaintiffs, California working women who were unable to work because of pregnancy-related disabilities, seek, individually and on behalf of all other persons similarly situated, to have this court declare invalid and enjoin the enforcement of section 2626 of the California Unemployment Insurance Code which denies state disability insurance benefits to workers disabled by injury or illness caused

by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter.[1]

Every nonwork-related disability, with the *sole* exception of pregnancy-related disability, is compensable under the state disability insurance laws. Thus compensable disabilities include illness or injury arising from sex change operations, attempted suicide, circumcision, prostatectomies, alcoholism, and cigarette-caused lung cancer. Noncompensable injury or illness includes heart-conditions, anemia, epilepsy, or bloodclotting when they are related to pregnancy, as well as the more common disabilities associated with pregnancy such as miscarriage, tubal pregnancy, labor and delivery.

Plaintiffs therefore challenge Section 2626 on the grounds that it denies women equal protection of the laws under Article I, sections 11 and 21 of the California Constitution and the Fourteenth Amendment to the Constitution of the United States. In addition, plaintiffs challenge the statute on the grounds that it discriminates against them on the basis of their sex contrary to Article XX, section 18 of the California Constitution and Title VII of the Civil Rights Act of 1964.

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1. At the request of the Attorney General and for the convenience of the court, plaintiffs submit this complaint consolidating the Complaint in *Aiello v. Hansen*, C-72-1402-SW, and the Petition for Writ of Mandate in *Armendariz, et al v. Hansen*, C-72-1547 SW. Except to the extent necessary to adapt the Petition for Writ of Mandate, written according to the rules and in the form appropriate to state court, to federal law and procedure (e.g., instead of mandamus, injunctive relief is sought under 28 U.S.C. § 1983; petitioners there are referred to as plaintiffs here) no significant additions, alterations, or deletions have been made in the substance of the complaint. Exhibits to the Petition for Writ of Mandate in *Armendariz* and the Complaint in *Aiello* are referred to and incorporated by reference in this consolidated complaint.

II

JURISDICTION

1. Jurisdiction is conferred on this court by 28 U.S.C. § 1343(3), (4) which provides for original jurisdiction of this court in all suits authorized by 42 U.S.C. § 1983 to redress the deprivation under color of state law of any right, privilege, or immunity secured by the Constitution of the United States or by an Act of Congress providing for equal rights or civil rights of all persons within the jurisdiction of the United States, and 28 U.S.C. § 1331, which provides for original jurisdiction of this court in civil actions arising under the Constitution, laws, or treaties of the United States. In addition, jurisdiction is conferred by section 706 (f) (3) of Title VII of the Civil Rights Act of 1964, 28 U.S.C. § 2000e-4(f), which confers on this court jurisdiction over actions arising under Title VII. Finally, this court has pendant jurisdiction over the state constitutional claims raised in this suit since the state and federal claims derive from a common nucleus of operative fact. (*United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).)

2. Plaintiffs' action for declaratory and injunctive relief is authorized by:

(a) 28 U.S.C. §§ 2201, 2202, and Rule 57 of the Federal Rules of Civil Procedure, which relate to declaratory judgments:

(b) 42 U.S.C. § 1983 which provides redress for the deprivation under color of law of rights, privileges and immunities secured to all citizens and persons within the jurisdiction of the United States by the Constitution and laws of the United States:

(c) Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 which prohibits discrimination on the basis of sex in employment.

III

THREE-JUDGE COURT

This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. §§ 2281, 2284 since plaintiffs seek an injunction to restrain defendant, who is a state officer, from the enforcement, operation and execution of a state statute (Cal. Unemp. Ins. Code, § 2626) of statewide applicability on the ground that said statute is contrary to the Constitution of the United States.

IV

PLAINTIFFS

1. Plaintiff CAROLYN AIELLO is a resident of the City and County of San Francisco, State of California.

2. Petitioner AUGUSTINA D. ARMENDARIZ is a resident of Gilroy, Santa Clara County, California.

3. Plaintiff ELIZABETH B. JOHNSON resides in Novato, Marin County, California.

4. Plaintiff JACQUELINE JARAMILLO resides in Oakland, Alameda County, California.

5. Plaintiff SAN FRANCISCO WAITRESSES UNION has its main office at 440 Ellis Street, San Francisco, California.

V

CLASS ACTION

The named plaintiffs bring this action on their own behalf and, pursuant to Rule 23(a), (b)(2) of the Federal Rules of Civil Procedure, on behalf of all other persons similarly situated. The class is composed of all women residing in California who, but for the fact that their disability is due to illness or injury caused by or arising in

connection with pregnancy, are or would be eligible to receive disability insurance benefits from the state of California. The persons in the class are so numerous that joinder of all members is impracticable; there are questions of law or fact common to the class; the claims of the representative parties are typical of the claims of the class; the representative parties will fairly and adequately protect the interests of the class; and the party opposing the class has acted on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

VI

DEFENDANT

Defendant SIGURD HANSEN is the Director of the Human Resources Development agency of the State of California and in his official capacity defendant is charged with the state-wide administration of the California Unemployment Compensation Disability Act. Defendant at all times mentioned herein was acting under color of state law.

VII

FACTS

1. More than two million California women are presently insured under the State Disability Insurance plan. These women, together with more than three million male workers, completely finance the disability insurance program through their mandatory contribution of approximately one percent of their earnings each pay period to the disability insurance fund. (See Actuarial Report of the Unemployment Compensation Disability Fund (1970) attached to and incorporated in the Memorandum of Points

and Authorities in Support of the Petition for Writ of Mandate as Exhibit A, and incorporated by reference herein.)

3. As a direct and proximate result of the operation of section 2626, the Department of Human Resources Development estimates that over 200,000 women per year are denied disability benefits for which they would otherwise be eligible were Section 2626 not to exclude pregnancy-related disabilities. (See publication of the Department of Human Resources Development dated June 12, 1972, attached and incorporated in the Petition for Writ of Mandate as Exhibit 10, and incorporated by reference herein.)

4. All the individual plaintiffs herein contributed one percent of their income to the State Disability Insurance fund through involuntary payroll deductions. Plaintiffs Aiello, Armendariz, and Johnson were all denied disability benefits on the ground that their disabilities were related to pregancy. At the time the Petition for Writ of Mandate was filed, plaintiff Jaramillo, who was in the eighth month of a normal pregnancy, had inquired as to her eligibility for state disability benefits during the time she was disabled by the birth of her child and was told that she would not be entitled to such benefits because of section 2626.

5. Until June 21, 1972, plaintiff CAROLYN AIELLO was employed as a hairdresser at Salvatore's Hair Cutting Company in the City and County of San Francisco, State of California.

6. On June 21, 1972, Ms. Aiello took a leave of absence from her employment because of medical problems arising in connection with a pregnancy. On or about June 22, 1972, she was hospitalized and underwent surgery at San Francisco General Hospital to correct a condition diagnosed as an ectopic pregnancy. Ms. Aiello remained in the hospital

until June 29, 1972. As of July 20, 1972 plaintiff has been physically unable to return to her former employment because of her weakened condition, pursuant to the advice of her physician.

7. On or about June 23, 1972, Ms. Aiello applied for disability benefits on the grounds that her physical condition rendered it impossible for her to continue her employment. On July 12, 1972, she received a Notice of Determination from the Department of Human Resources Development that her claim for disability was denied for the reason that her disability was due to illness or injury arising in connection with pregnancy. (A copy of said notice is attached to and incorporated in the original complaint as Exhibit A, and is incorporated by reference herein.)

8. Plaintiff AUGUSTINA D. ARMENDARIZ is a 29 year old woman who is married and the mother of an eight-month-old son. She is now the sole support of herself, her hubsand, and her son. She works full-time as a secretary, taking home earnings of approximately $197 twice each month. Ms. Armendariz has been self-supporting and employed full-time since 1961. (See Declaration of Augustina D. Armendariz, attached to and incorporated in the Petition for Writ of Mandate as Exhibit 1, and incorporated by reference herein.)

9. During the fourth month of pregnancy, Plaintiff Augustina Armendariz suffered a miscarriage and was unable to work again for 22 days. On May 9, 1972, she was forced to leave work because she felt ill. She began bleeding and was told by her doctor to rest at home. Early in the morning of May 9, she went into labor and, in the ambulance on the way to the hospital, suffered a miscarriage. At the hospital, her physician performed a dilation and curetage. Ms. Armendariz remained in the hospital

until the morning of May 11, 1972. She was told that she could not go back to work until May 28, 1972. (See Doctor's certificate of Taki N. Anagnoston, M.D., attached to and incorporated in Petition for Writ of Mandate as Exhibit 2 and incorporated by reference herein.) Ms. Armendariz returned to work on May 30, 1972, the first working day after May 28, 1972.

10. Plaintiff Armendariz applied for State Disability Insurance benefits on May 15, 1972. Her claim was denied on May 24, 1972. The sole basis for denial of benefits was that her disability arose in connection with pregnancy. Plaintiff Armendariz requested a hearing before the Unemployment Insurance Appeals Board referee on May 30, 1972. The hearing was held on July 6, 1972. On July 17, 1972, referee Anthony Schmidt rendered his decision denying Plaintiff's claim on the basis of Section 2626 of the Unemployment Insurance Code.

11. At her hearing before the referee, Plaintiff Armendariz had challenged Section 2626 on the same grounds presented herein. The referee's decision (attached to and incorporated in the Petition for Writ of Mandate as Exhibit 3 and incorporated by reference herein) relies on Precedent Tax Decision P-T-31 of the Unemployment Insurance Appeals Board to the effect that it is not within the proper scope of administrative adjudication to determine whether legislation is constitutional. After counsel sought clarification of the continued viability of P-T-31, the referee acknowledged that said decision is still in effect. (See letter of Anthony Schmidt, attached to and incorporated in the Petition for Writ of Mandate as Exhibit 4 and incorporated by reference herein.) (Precedent Tax Decision P-T-31 is also attached to and incorporated in the Petition for Writ of Mandate as Exhibit 5 and incorporated by reference herein.)

12. Plaintiff ELIZABETH B. JOHNSON is the head of a household composed of herself and her son, Demetrius, age five years. She is the sole source of support for herself and her son. Ms. Johnson has been employed as an operator for the telephone company for over two years. Her take-home pay averages $75 every two weeks. She also receives a small supplement from the county welfare department to assist her in meeting certain costs.

13. Plaintiff Johnson was admitted to the Kaiser Foundation Hospital in Marin County on May 22, 1972, after experiencing intense abdominal pain, swelling in the legs, back pain, body aches, fever, nausea, dizziness, and general illness for several days. Her condition was diagnosed as a tubal pregnancy and an operation deemed necessary to save her life. The operation was performed on May 23, 1972. Ms. Johnson was discharged from the hospital on May 30, 1972, and was advised that the first day she would be able to return to work would be July 10, 1972, approximately six weeks after the operation. (See Declaration of Elizabeth B. Johnson, attached to and incorporated in the Petition for Writ of Mandate as Exhibit 6 and incorporated by reference herein.)

14. Plaintiff Johnson's application for State Disability insurance benefits, due to her illness and disability resulting from the tubal pregnancy, was denied on June 12, 1972. (See Notice of Determination, attached and incorporated in the Petition for Writ of Mandate as Exhibit 7 and incorporated by reference herein.) The stated reason for denying Ms. Johnson benefits for the first 28 days of her disability was that she was disqualified from such benefits by Section 2626 of the California Unemployment Insurance Code.

15. Plaintiff JACQUELINE JARAMILLO is a 21-year-old woman who is pregnant and is expecting a baby on September 4, 1972. Except for her husband's educational expenses, which are paid for under the G.I. Bill, she is the sole support for herself, her husband, and their expected child. Although she is more than eight months pregnant, Ms. Jaramillo continues to work because her family has no other source of support. Because of the denial of benefits pursuant to § 2626, she intends to return to work as soon as her doctor will permit. (See Declaration of Jacqueline Jaramillo attached to and incorporated in Petition for Writ of Mandate as Exhibit 8 and incorporated by reference herein.)

16. Plaintiff SAN FRANCISCO WAITRESSES UNION consists of 4000 members, all of them women. A substantial number of the members of petitioner Union have been or will be adversely affected by Unemployment Insurance Code Section 2626. (See Declaration of San Francisco Waitresses Union, attached to and incorporated in the Petition for Writ of Mandate as Exhibit 9 and incorporated by reference herein.)

VIII

FIRST CAUSE OF ACTION

For a first cause of action plaintiffs allege:

1. Section 2626 of the California Unemployment Insurance Code provides:

> "Disability" or "disabled" includes both mental and physical illness and mental or physical injury. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work. In no case shall the term "disability" or "disabled" include

any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter.

2. This provision creates two classes of persons for purposes of State Disability Insurance: one class composed of persons unable to work because of mental or physical illness or injury not related to pregnancy, and the other class composed of persons unable to work because of illness or injury caused by or arising in connection with pregnancy.

3. Persons who in all other ways qualify for State Disability Insurance benefits are denied those benefits in California solely because their disability is caused by or arises in connection with pregnancy.

4. These disabled persons who are denied benefits are indistinguishable from those who do receive benefits, except for the cause of their disability.

5. California Unemployment Insurance Code Section 2626, in severely limiting the compensability of pregnancy-related disabilities, discriminates against women solely on account of their sex. No adequate state justification exists for the arbitrary classification scheme embodied in Section 2626, and hence it is invalid under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

IX

SECOND CAUSE OF ACTION

For the second cause of action, plaintiffs allege:

1. For the reasons set forth in Paragraphs 1 through 4 of the First Cause of Action, section 2626 of the California Unemployment Insurance Code discriminates against

women on the basis of their sex and no adequate state justification exists for the arbitrary classification scheme embodied in that section. Therefore, section 2626 is invalid under the equal protection clauses of Article I, section 11 and 21, of the Constitution of the State of California.

X

THIRD CAUSE OF ACTION

For a third cause of action, plaintiffs allege:

1. By denying women employees disabled by pregnancy-related illness or injury the disability benefits which relieve the financial hardship of all other disabled employees covered by the California Unemployment Compensation Disability Act, Section 2626 places said women employees at a serious disadvantage in the pursuit of their chosen occupations and discriminates against them in the terms and conditions of their employment solely on the basis of their sex.

2. The statute, without adequate justification, therefore abridges Article XX, section 18 of the California Constitution which provides that a person may not be disqualified because of sex from entering or pursuing a lawful business, vocation, or profession.

XI

FOURTH CAUSE OF ACTION

For a fourth cause of action, plaintiffs allege:

1. For the reasons set forth in paragraphs 1 through 4 of the First Cause of Action, Section 2626 of the California Unemployment Insurance Code discriminates against women on the basis of their sex in the terms and conditions of employment.

2. Section 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) makes it an unlawful employment practice to discriminate against individuals with respect to the compensation, terms, conditions, or privileges of employment or to limit, segregate or classify employees in any way which would adversely affect their status as employees on the basis of those individuals' sex.

3. The Sex Discrimination Guidelines issued by the Equal Employment Opportunity Commission pursuant to Title VII of the Civil Rights Act of 1964 (29 C.F.R. § 1604 *et seq.*) state that disabilities caused by or contributed to by pregnancy or childbirth are, for all job-related purposes, temporary disabilities and should be treated as such under temporary disability insurance plans available in connection with employment.

4. Section 2626 is contrary to the intent and purpose of Title VII of the Civil Rights Act of 1964 and the guidelines issued pursuant thereto, and therefore is invalid under the Supremacy Clause of the United States Constitution.

XII

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray, on behalf of themselves and those similarly situated, that this Court:

1. Assume jurisdiction of this cause, convene a three-judge district court pursuant to 28 U.S.C. §§ 2281 and 2284 to determine this controversy, and set this case down promptly for a hearing.

2. Determine by order, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, that this action be maintained as a class action.

3. Enter a final judgment pursuant to 28 U.S.C. §§ 2201 and 2202 and Rules 54, 57 and 58 of the Federal Rules of Civil Procedure declaring that California Unemployment Insurance Code § 2626 is invalid on the grounds that it is violative of Article 1, sections 11 and 21 and Article XX, section 18 of the California Constitution, and the equal protection clause of the Fourteenth Amendment and the Supremacy Clause (Article VI, cl. 2) to the Constitution of the United States.

4. Enter preliminary and permanent injunctions pursuant to Rule 65 of the Federal Rules of Civil Procedure:

(a) Enjoining defendant, his successors in office, agents and employees, and all other persons in active concert and participation with him from refusing to grant to plaintiffs and all persons similarly situated State Disability Insurance benefits on the ground that their disabilities are caused by or arise in connection with pregnancy.

(b) Ordering the defendant to implement appropriate interim regulations for providing women with pregnancy-related disabilities state disability benefits on the same basis as other disabled employees pursuant to the California Unemployment Insurance Code.

(c) Directing defendant to award to plaintiffs Aiello, Armendariz, Johnson and Jaramillo the state disability insurance benefits, due to and denied them for their pregnancy-related disabilities, on the same basis as benefits are awarded for disabilities unrelated to pregnancy.

5. Award plaintiffs reasonable attorneys' fees.

6. Award plaintiffs their costs of suit and grant them and all others similarly situated such additional or alter-

native relief as may seem to this court to be just, proper and equitable.

Dated: December 26, 1972.

Respectfully submitted,

ROLAND C. DAVIS
JOEL GOMBERG
CECILIA D. LANNON
JOSEPH C. MOREHEAD
PETER H. WEINER
WENDY WEBSTER WILLIAMS

Attorneys for Plaintiffs

By: s/ WENDY WEBSTER WILLIAMS
Wendy Webster Williams

Exhibit 1

[to Plaintiffs' State Court Petition for Writ of Mandate]

DECLARATION OF AUGUSTINA D. ARMENDARIZ

I, AUGUSTINA D. ARMENDARIZ, declare:

That I am one of the named petitioners in the suit on file herein.

I am 29 years old, am married, and have an eight-month-old son. I am now the sole source of support for myself and my family.

I am now employed as a secretary. I have been employed full-time, supporting myself and now my family for eleven years. My take-home pay is $197 every two weeks. My husband worked the first four months of this year, grossing $2200, but is now unemployed and will remain unemployed for the rest of the year. He has been recuperating from an operation and will soon enter school.

On May 8, 1972, I was forced to leave work in the afternoon because I felt ill. I went to my doctor, Dr. Taki N. Anagnoston, who told me that I was bleeding and that I should rest at home. The bleeding and cramps became worse during the night. At about 2:00 a.m. I had to call an ambulance. I went into labor and, in the ambulance on the way to the hospital, suffered a miscarriage. At the hospital, I underwent a dilation and curetage. I remained in the hospital until the morning of May 11, 1972. My doctor told me that I could not go back to work until May 28, 1972. The next working day subsequent to May 28, 1972, was May 30, 1972. On that day I did return to work.

I applied for State Disability Insurance benefits on May 15, 1972. My claim was denied on May 24, 1972. I was told that the only basis for denying me benefits was that my

disability arose in connection with pregnancy. I requested a hearing before the Unemployment Insurance Appeals Board referee on May 30, 1972. The hearing was held on July 6, 1972. At that hearing I challenged the constitutionality of Section 2626 of the California Unemployment Insurance Code because it discriminates against women. On July 17, 1972, the referee rendered his decision denying my claim and stated that he could not decide the constitutionality of Section 2626 of the Unemployment Insurance Code.

I suffered an immense amount of pain resulting from my miscarriage. For at least two weeks thereafter, I was unable even to wash the household dishes. I was able to arise from my bed only sporadically and had to rest most of the time. I was very weak, and I know that I could not have worked. I do not understand why the Legislature decided that my disability, which was certainly as real as any other, should be denied compensation just as if it were a normal condition. As a result of my being unable to get disability benefits, my family and I have suffered severe financial hardship.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 15, 1972, at Gilroy, California.

AUGUSTINA D. ARMENDARIZ

AUGUSTINA D. ARMENDARIZ

Exhibit 6

[to Plaintiffs' State Court Petition for Writ of Mandate]

DECLARATION OF ELIZABETH B. JOHNSON IN SUPPORT OF COMPLAINT HEREIN

I, ELIZABETH B. JOHNSON, declare:

That I am one of the named plaintiffs in the suit on file herein.

That I am the head of a household composed of myself and my minor son, Demetrius, age five years. I am the sole source of support for myself and my son.

As head of the household I have been employed as an operator for the Telephone Company for over two years. After deductions, dues, credit union charges and miscellaneous business expenses, my take home pay from my position with the Telephone Company averages $75.00 every two weeks. In addition to this pay, I receive a small supplement from the County Welfare Department to assist me in meeting costs for transportation, child care, and other business expenses, so that I may remain gainfully employed, and, hopefully, may be able to become entirely self-supporting in the near future.

That on May 22, 1972, after experiencing intense abdominal pain, swelling in the legs, back pain, bodyaches, fever, nausea, dizziness and general illness for several days, I was admitted to the Kaiser Foundation Hospital in Marin County. After several tests at the hospital and examinations by many specialists, my condition was diagnosed as tubal pregnancy. I was informed that an operation was mandatory, and had to be performed immediately, since the affected area had ruptured and was causing internal hemorrhaging, which could be fatal.

The operation was performed on May 23, 1972. I was released from the hospital on May 30, 1972, and advised that the first day I would be able to return to work would be July 10, 1972, approximately six weeks after the operation.

That I applied for benefits due to my illness and disability for the period beginning with my hospitalization on May 22, 1972. On June 12, 1972, I was advised by the claims examinor that my claim for disability insurance was disallowed, since my disability was "due to illness or injury caused by or arising in connection with pregnancy". The notice of determination cited the California Unemployment Insurance Code Section 2626, and advised me that I could file a claim if I still was disabled 29 days after the termination of the pregnancy. In order to obtain the benefits it would be necessary for me to re-file at that time. I was also advised informally, that I would only be paid for twelve days of disability, even though I was unable to work for approximately six weeks pursuant to doctors' orders. In fact, when I waited the requisite 29 days to file my claim, I was paid for 12 days, a total of $101.00 for six weeks' disability. I was advised by the Human Resources Development Department that even though I was eligible for additional days of disability, the Department intended to keep 7 days of disability funds due me as a penalty, since I was not in the hospital at the time I re-filed my claim.

That during the time when I was off work, my total sick leave pay from my position with the Telephone Company amounted to $128.10, which sum represents approximately ½ of my regular pay, which is the standard rate of sick leave pay for Telephone Company employees.

That I was advised by my doctor that the tubal pregnancy which I suffered was an abnormal condition, which

always resulted in termination of pregnancy. There is no hope that the pregnancy can continue normally in such a situation. I was advised by my doctor that if the condition were not corrected via surgery, it could prove fatal, could affect future child-bearing and/or cause sterility, and would certainly necessitate lengthy hospital stays. I did not choose to have a tubal pregnancy, an abnormal and painful condition, to jeopardize my health, or run the risk of dying as a result of this condition, which could never result in a successful pregnancy. I do not understand why this debilitating illness was treated and penalized by the Human Resources Development Department just as if it were a normal, consciously chosen, healthy and successful pregnancy.

That my son and I are suffering because of the disallowance of my disability claim in that our income has been reduced drastically, so that I cannot pay for the basic necessities of life for us.

I declare under penalty of perjury the foregoing to be true and correct.

Executed on 12 Aug 72, at San Rafael, California.

ELIZABETH B. JOHNSON

ELIZABETH B. JOHNSON

Exhibit 8

[to Plaintiffs' State Court Petition for Writ of Mandate]

DECLARATION OF JACQUELINE JARAMILLO

STATE OF CALIFORNIA }
COUNTY OF ALAMEDA } ss.

I, JACQUELINE JARAMILLO, being duly sworn, deposes and says:

I am Twenty-one (21) years old and currently reside with my husband, LOUIS JARAMILLO, age Twenty-eight (28), at 828 Adeline Street, Apartment "E", Oakland, California.

Since November of 1971, I have been employed as a Compliance Officer with the Model Cities Unit, a division of the Alameda County Legal Aid Society. At present, my gross earnings are Seven Hundred Dollars ($700) per month, take-home pay amounting to about Five Hundred and Fifteen Dollars ($515) per month.

During the past academic year, 1971-1972, my husband has not been employed due to the fact that he has been enrolled as a law student at the University of San Francisco School of Law. I have, for the past academic year, and continue to be at present the principal wage-earner in our family.

At this time I am eight months pregnant and am due to deliver my child approximately the first week of September, 1972. I intend to work as long as I am physically able to do so and intend to return as soon as my doctor permits me to do so.

Insofar as my husband is a student, who does not receive financial assistance from school, our sole source of income will be my husband's G. I. Benefits, which amounted to Two Hundred and Five Dollars ($205) per month during

the time that he is enrolled in school. This amount will be increased by about Twenty Five Dollars ($25) upon the birth of our child. The G.I. benefits go entirely to pay for my husband's education. Tuition at U.S.F. is approximately Two Thousand Dollars ($2000) per year, we must pay One Thousand Dollars ($1000) of this in September. Also the law books my husband must buy are very expensive.

I have been informed by my employer that I am not eligible for either unemployment insurance benefits or disability insurance benefits during that time when I am on maternity leave. Nor will my employer continue to maintain me on the payroll during such time. Finally, I contacted the Welfare Department and they informed me that I would be ineligible for Welfare relief because my husband is a student and receives G.I. benefits while in school. Because the G.I. bill benefits go to pay for my husband's education, my income is the sole source of food, rent and other necessities of life. Without disability benefits during the time I cannot work, my husband, new baby and I face severe deprivation.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Oakland, California on Aug. 10th, 1972.

JACQUELINE JARAMILLO

JACQUELINE JARAMILLO

Exhibit E

[to Plaintiffs' State Court Petition for Writ of Mandate]

DECLARATION OF DR. ALAN GOLDFIEN IN SUPPORT OF PETITIONER'S COMPLAINT

STATE OF CALIFORNIA
COUNTY OF SAN MATEO } ss.

I, Dr. Alan Goldfien, am a Professor of Medicine in the Department of Obstetrics and Gynecology at the University of California Medical Center, Parnassus and Third Streets, San Francisco, California.

From my experience as a teacher as well as practicing physician, I know that there are certain periods during every pregnancy when a woman is not physically able to work. Every pregnancy results in an inability to work during labor and for several days thereafter. Some complications of pregnancy or birth such as a caesarian section or infection can result in a longer period of hospitalization and inability to work.

Dated: August 14, 1972.

ALAN GOLDFIEN
Dr. Alan Goldfien

Official Seal
MILDRED W. FITZHARRIS
Notary Public-California
San Francisco County

My Commission Expires June 19, 1976
Subscribed and sworn to
before me this August 14, 1972.
MILDRED W. FITZHARRIS
Notary Public

In the United States District Court
for the Northern District of California

CAROLYN AIELLO, individually and on behalf of all others similarly situated, *Plaintiff,* vs. SIGURD HANSEN, as Director of the State Department of Human Resources Development, *Defendant.*	Civ. No. C-72-1402 SW
AUGUSTINA D. ARMENDARIZ, ELIZABETH B. JOHNSON, JACQUELINE JARAMILLO, et al., individually and on behalf of all other women similarly situated, *Petitioners,* vs. SIGURD HANSEN, as Director of the State Department of Human Resources Development, *Respondent.*	Civ. No. C-72-1547 SW

ANSWER TO
CONSOLIDATED COMPLAINT

Defendant Sigurd Hansen, Director of the Department of Human Resources Development hereby answers the consolidated complaint on file herein and admits, denies and alleges as follows:

Answering plaintiffs' FIRST CAUSE OF ACTION, defendant:

1. Admits the allegations of paragraph 1.

2. Admits the allegations of pragraph 2, except that defendant denies that persons whose illness or injury arises

in *connection with* pregnancy are in the same class as those whose illness or injury is *caused* by pregnancy. Defendant further alleges that compensation is denied only in cases where illness or injury is *caused by* pregnancy, as a result of "Precedent Decisions" which require the payment of compensation in cases where the causative agent is something other than pregnancy, even though pregnancy may be incidental.

3. Admits the allegations of paragraph 3, except that defendant denies that benefits are denied to a woman whose disability arises in connection with but is not caused by pregnancy.

4. Admits the allegations of paragraph 4.

5. Denies the allegations of paragraph 5.

Answering plaintiffs' SECOND CAUSE OF ACTION, defendant denies each and every allegation thereof.

Answering plaintiffs' THIRD CAUSE OF ACTION, defendant denies each and every allegation thereof.

Answering plaintiffs' FOURTH CAUSE OF ACTION, defendant:

1. Denies the allegations of paragraph 1.

2. Admits the allegations of paragraphs 2 and 3.

3. Denies the allegations of paragraph 4 and further alleges that neither Section 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (a) nor the Sex Discrimination Guidelines issued by the E.E.O.C. thereunder is applicable to defendant, since defendant is excluded from the definition of employer under 42 U.S.C. § 2000e(b)(1).

AS AND FOR A FURTHER, SEPARATE AFFIRMATIVE DEFENSE TO THE COMPLAINT, defendant alleges that plaintiffs' consolidated complaint fails to state a claim upon which relief can be granted.

WHEREFORE, defendant prays that plaintiffs take nothing by their complaint on file herein, that defendant have judgment for his costs of suit herein incurred and for such other and further relief as to the court may seem proper.

DATED: January 18, 1973.

EVELLE J. YOUNGER, Attorney General
of the State of California

ELIZABETH PALMER
Assistant Attorney General

JOANNE CONDAS
Joanne Condas
Deputy Attorney General

Attorneys for Defendant

In the United States District Court
for the Northern District of California

CAROLYN AIELLO, individually and on behalf of all others similarly situated, *Plaintiff,* vs. SIGURD HANSEN, as Director of the State Department of Human Resources Development, *Defendant.*	Civ. No. C-72-1402 SW
AUGUSTINA D. ARMENDARIZ, ELIZABETH B. JOHNSON, JACQUELINE JARAMILLO, et al., individually and on behalf of all other women similarly situated, *Petitioners,* vs. SIGURD HANSEN, as Director of the State Department of Human Resources Development, *Respondent.*	Civ. No. C-72-1547 SW

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

To the above-named defendants:

PLEASE TAKE NOTICE that the plaintiffs will bring on for hearing in Room 10 of the United States Courthouse, 450 Golden Gate Avenue, San Francisco, California, on the 22nd day of February, 1973, at 2 p.m. o'clock, or as soon thereafter as counsel can be heard, the following motion for summary judgment.

Plaintiffs move the Court as follows:

That it enter, pursuant to Rule 56 of the Federal Rules

of Civil Procedure, a summary judgment in plaintiffs' favor for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that plaintiffs are entitled to a judgment as a matter of law.

This motion is based upon the Petition for Writ of Mandate in *Armendariz v. Hansen*, Civil No. C-72-1547-SW, the Complaint in *Aiello v. Hansen*, Civil No. C-72-1402-SW, and the Consolidated Complaint in *Aiello, et al v. Hansen*, Civil No. C-72-1402-SW.

Dated Januray 10, 1973

ROLAND C. DAVIS
JOEL GOMBERG
CECILIA D. LANNON
JOSEPH MOREHEAD
PETER H. WEINER
WENDY W. WILLIAMS

By WENDY W. WILLIAMS
Wendy W. Williams
Attorneys for Plaintiffs

In the United States District Court
for the Northern District of California

CAROLYN AIELLO, individually and on behalf of all others similarly situated, *Plaintiff,* vs. SIGURD HANSEN, as Director of the State Department of Human Resources Development, *Defendant.*	Civ. No. C-72-1402 SW
AUGUSTINA D. ARMENDARIZ, ELIZABETH B. JOHNSON, JACQUELINE JARAMILLO, et al., individually and on behalf of all other women similarly situated, *Petitioners,* vs. SIGURD HANSEN, as Director of the State Department of Human Resources Development, *Respondent.*	Civ. No. C-72-1547 SW

NOTICE OF MOTION: MOTION TO DISMISS COMPLAINT: MEMORANDUM OF POINTS AND AUTHORITIES.

TO: All counsel of record for all parties to this action:

Please take notice that on February 22, 1973 at 2:00 p.m., or as soon thereafter as counsel may be heard, in Courtroom 10, Federal Building, 450 Golden Gate Avenue, San Francisco, California, Defendant Sigurd Hansen, Director of the Department of Human Resources Development of the State of California, will move the Court to dismiss the consolidated complaint filed herein, for the reasons that the court lacks jurisdiction, in that the complaint raises no sub-

stantial federal question, and that the complaint fails to state a claim upon which relief can be granted.

Said motion to dismiss and opposition to motion for summary judgment will be based on all the pleadings, records and papers on file herein and the memorandum of law attached and filed and served with this Notice of Motion and such other grounds as may be offered at the hearing.

DATED: January 31, 1973.

EVELLE J. YOUNGER,
Attorney General of the
State of California

ELIZABETH PALMER
Assistant Attorney General

JOANNE CONDAS
Joanne Condas
Deputy Attorney General

Attorneys for Defendant

AFFIDAVIT

[In support of motion to dismiss complaint]

DR. D. ALLEN TREAT, being first duly sworn, deposes and says:

I am Medical Director for the Department of Human Resources Development and have held that post since 1970. Prior to taking that position, from 1964 to 1970, I was Statewide Medical Consultant to the Aid to Totally Disabled program of the Department of Social Welfare. From 1962 to 1964 I was Assistant Medical Director of the Department of Employment. From 1959 to 1962 I was Medical Director of Sacramento County Hospital, and from 1953 to 1959 I was Assistant Medical Superintendent of San Francisco General Hospital.

As a physician and as Medical Director of Human Resources, Development, I have had occasion to obtain information concerning pregnancy and the complications of pregnancy. It is my observation that obstetricians normally schedule the first postpartum examination six weeks after the date of delivery. This interval after birth allows for complications to develop if there are any or for the mother's condition to return to normal. If a medical certification that a mother is physically fit to return to work is required, it will normally be executed by the physician at this time.

It is also my observation that obstetricians tend to prescribe cessation of employment for their patients during the third trimester of pregnancy for various reasons. These reasons include reducing and controlling the amount of physical exertion, better control over diet, greater ease in arranging medical appointments, and availability for immediate hospitalization in case of labor onset. These factors

are present in every pregnancy and they are vitally important in cases involving complications of pregnancy.

As a result of my experience and observations, it is my conclusion that the average pregnancy will result in a woman being disabled in a medical sense for a period of 15 to 18 weeks.

D. ALLEN TREAT
Dr. D. Allen Treat

Subscribed and sworn to before me this 22nd day of January, 1973.

BILLIE R. HUNTLEY
Notary Public

Notary Seal

AFFIDAVIT

[In Support of Motion to Dismiss Complaint]

DR. WALTER M. BALLARD, M.D., being first duly sworn, deposes and says:

I am Chief of Maternal Health and Family Planning, Bureau of Maternal and Family Health, State Department of Public Health. I have been employed by the State Department of Public Health for approximately four and one-half years. Prior thereto, I was engaged in the private practice of medicine as an obstetrician and gynecologist. In addition to my M.D. degree, I hold board certification by the American Board of Obstetrics and Gynecology. I also hold a master's degree in public health from the University of California at Berkeley.

In my experience and observation it is conservative medical practice to prescribe that pregnant women cease working during the third trimester of pregnancy as an element of good prenatal care. Increased rest is beneficial in reducing the incidence of toxemia and also in reducing the incidence of prematurity of birth.

Reducing the amount of physical activity tends to lessen the likelihood of developing toxemia. In women who do develop toxemia, rest is a definite part of their therapy.

Reducing the amount of physical activity also tends to lessen the chance of early onset of labor and premature birth. Premature birth is undesirable, inasmuch as the incidence of mental retardation among premature babies is approximately 10%, as opposed to the normal incidence of 3% in the general population.

WALTER M. BALLARD, M.D.

Dr. Walter M. Ballard, M.D.

Subscribed and sworn to before
me this 24th day of January, 1973.

DARTOP KAPOOR
Notary Public

(Notary Seal)

AFFIDAVIT

[In Support of Motion to Dismiss Complaint]

CHARLES E. SEVICK, being first duly sworn, deposes and says:

I am Senior Research Analyst, Department of Human Resources Development, and have held this position since 1962. In all, I have been employed in statistical research with the Department for approximately 24 years. In such position, my duties include preparation of cost estimates for various legislative proposals affecting the Unemployment Insurance and Disability Insurance Funds and preparation of data concerning the solvency of these funds.

The past claims experience of the Disability Insurance Fund has been that the amount of benefits paid out almost equals the amount of contributions received. Set out below are the figures for the years 1966 through 1970:

Cost Rates; Amount of Benefits Paid Divided by Contributions Earned	
1966	.90
1967	.91
1968	.91
1969	.94
1970	1.03

Figures for later periods are not yet available.

Based upon the assumptions described below, it is anticipated that inclusion of pregnancy coverage would increase claims against the fund by $120.2 million, or 36.4%.

The assumptions made to compute this figure of $120.2 million were:

1. The average weekly benefit would be $62.96. This was computed by estimating the average weekly benefit

amount for 1972 for the entire program. A study was then made which showed that the women's benefit rate was approximately 85% of the average rate for the program, over the past five years. It was assumed that this rate would again be approximately 85% in 1972. The estimated program weekly benefit amount × .85 = $62.96.

2. The Population Studies Section of the State Department of Finance furnished the figure of 330,000 births in California in 1971. We assume the same rate would apply in 1972. We further assumed that one-third of these births would be to women covered by the Disability Insurance program, based on Table 11 of "Health Insurance Coverage, Legitimate Live Births, U.S.—1964-1966" (available from U.S. Government Printing Office). This table shows that in the period 1964-1966, 60% of pregnant white mothers and 33⅓% of non-white mothers were employed.

3. The duration of benefits payable for the major category of live births was assumed to be 15 weeks, with 4.0 days hospitalization benefits. Abortions were computed at one week of basic benefits and an average of 2.0 days hospitalization, based upon data furnished by the State Department of Public Health.

CHARLES E. SEVICK

Charles E. Sevick

Subscribed and sworn to before
me this 23rd day of January, 1973.

BILLIE R. HUNTLEY

Notary Public

(Notary Seal)

AFFIDAVIT

[In reply to motion to dismiss]

I, GEORGE C. CALDERWOOD, M.D. state:

I am an obstetrician and gynecologist certified by the American Board of Obstetrics and Gynecology and have practised obstetrics since 1946. In addition, I am a Fellow of the American College of Surgeons and a member of the Pacific Coast Fertility Society and the San Francisco Gynecology Society.

In recent years the attitude that women should be confined for long periods of time prior to and following childbirth has been replaced by the view that women should be encouraged to continue with their normal activities as long as they feel comfortable doing so and, in addition, should be permitted to resume those activities after birth as soon as they are able. The period of time a woman is medically disabled will, of course, depend on a number of factors, including the nature of her job and her general health.

It is my opinion that a conservative estimate of the average time reasonably healthy women can be expected to be disabled due to impending birth and birth is three to four weeks before and three to four weeks after birth. In fact, many of my patients are able to work up to the time they begin labor.

s/ GEORGE CALDERWOOD

George C. Calderwood

Subscribed and sworn to before me
this February 16th, 1973.

s/ MARY A. CHANG
Notary Public

AFFIDAVIT

[In reply to motion to dismiss]

I, PHILLIP J. GOLDSTEIN, M.D., state:

I am Acting Chief of Obstetrics and Gynecology at San Francisco General Hospital. I am an Assistant Professor of Obstetrics and Gynecology at the University of California at San Francisco. I have been full time Director of the Obstetrics Department at San Francisco General Hospital for 3½ years.

From 1968 to 1969 I was a Fellow in Reproductive Biology at the University of California at Los Angeles investigating Fetal Physiology and Acid Base Physiology.

I was a Captain in the United States Army practising Obstetrics and Gynecology for Fort Bragg, North Carolina, from 1966 to 1968.

I was in private practice of Obstetrics and Gynecology from late 1965 to 1966, after finishing a four year residency in Obstetrics and Gynecology at the Jewish Hospital of St. Louis and the St. Louis Maternity Hospital.

The current trend among practitioners of my specialty is to deal more fully with the family unit than we have in the past. This requires evaluating each patient within the context of her social, economic and psychological status while following her obstetric development. Consequently, it becomes impossible to delineate optimal or average time for employment to be either suspended or initiated relative to pregnancy. There will be marked variation in the ability to work based on the number of children, the availability of child care, the presence of complications, and the patient's economic need. Despite these qualifications, however, it is my experience that a large number of women are able to work up until the onset of labor.

The six week return visit is of historical interest only. Ovulation occurs earlier after birth than six weeks post partum, so the medical provider should see patients for whom family planning is appropriate before the traditional six weeks time.

PHILLIP J. GOLDSTEIN, M.D.
Phillip J. Goldstein

Subscribed and sworn to before me
this February 16, 1973.

MAY A. CHANG
Notary Public

Notary Seal.

AFFIDAVIT

[In reply to motion to dismiss]

Dr. N. R. Trueblood, being first duly sworn, deposes and says:

I am an obstetrician and gynecologist certified by the American Board of Obstetrics and Gynecology. I have engaged in the private practice of my specialty since 1967. In addition I am a clinical instructor on the faculty of the Stanford University Medical Center.

Based on my ten years of experience as an obstetrician and gynecologist, it is my conclusion that, in a normal pregnancy with no complications, women working in most of the jobs typically open to them are not disabled in a medical sense until the onset of labor.

It is my belief that it is not only medically unnecessary for most women to cease employment, but that in many cases, it is physically better for the patient to remain active even in the last trimester of pregnancy.

I believe that the views outlined above are not only my personal opinions, but reflect the general attitude of physicians toward pregnancy in 1973.

N. R. Trueblood M.D.
N. R. Trueblood

Subscribed and sworn to before me this February 14, 1973.

Betty W. Carroll
Notary Public

Notary Seal

AFFIDAVIT

[In reply to motion to dismiss]

BETTY KIDDER, being duly sworn, deposes and says:

I have for the past four years worked as a Disability Insurance Officer I in the San Francisco office of the State Disability Insurance Office. During that time, I have handled numerous claims, including those which relate to pregnancy.

Of all the disabilities pregnancy-related disability is the only one not compensated by my department. I personally have paid on claims for disability caused by sex change operations, prostatectomies, circumcision, disabling alcoholism and drug addiction, suicide attempts, sickle cell anemia, psychiatric problems and many others. Based on my personal experience, I believe that one of the most frequently compensated disabilities are those caused by hernias. Of all the disabilities caused by hernias that I have compensated, none were suffered by women. The average disability period for hernias is six to eight weeks. In addition, a large proportion of the disabilities on which I have paid claims are caused by heart conditions and the great majority of these are suffered by men. This disability lasts on an average two to three months.

The manner in which we process claims which may be related to pregnancy is different from other claims. When an original claim form is received in the office, it is given to an examiner for screening. On the doctor's section of the form, one of the questions is whether the applicant is pregnant. If the examiner notices that the doctor has answered the pregnancy question in the affirmative (even though the doctor has stated that the disability is unrelated to the pregnancy) *or* if the doctor answers "no" to the pregnancy question, but the disability is one often related

to pregnancy (such as a "d and c"), investigative procedures are instituted.

Every other claim that comes to the office (except some workmen's compensation claims which are processed under a different system) is processed immediately, and the award established within seven to ten days. In claims where there is a suspicion of pregnancy, these claims are not processed in the normal way. Instead, they are held up for a medical investigation. As a result, such claims may take a month or more to process, during which time the claimant has received no word on the state of her claim.

In addition, if a woman suffers two concurrent disabilities, one pregnancy-related, and one not related to pregnancy, and therefore compensable, she is not paid benefits as long as the pregnancy-related disability exists.

BETTY KIDDER
Betty Kidder

Subscribed and sworn to before me
this February 16, 1973.

FRED H. ALTSHULER
Notary Public

Notary Seal

AFFIDAVIT

[In Support of Amicus Curiae Brief of Equal Employment Opportunity Commission]

Dr. Andre Eugene Hellegers, being first duly sworn, deposes and says:

I am Professor of Obstetrics and Gynecology, Georgetown University Hospital, Washington, D.C., and have held that position since 1967. Since 1971, I have also been the Director of the Kennedy Institute for the Study of Human Reproduction and Bioethics, Georgetown University Hospital. I was also the President of the Perinatal Research Society, a professional organization made up of obstetricians, pediatricians and others engaged in research on the perinatal period; that is, the period before and after childbirth. I obtained my medical degree from Edinburgh University Medical School in 1951.

As a physician and as a professor of obstetrics and gynecology, I have specialized for 15 years in the medical problems surrounding childbirth and pregnancy. In my judgment, most women with normal pregnancies are physically disabled for only a short period of time. Unless her job involves heavy lifting on a regular basis, there is no medical reason that a women cannot continue working until the day of delivery. The only exception might be a case in which a pregnant woman is actually prevented, in a physical sense, from doing her job because of her increased girth; (for the same reasons that an overweight male might be prevented from doing certain jobs).

Moreover, in my opinion the average woman is physically able to return to work within three weeks after delivery. This period of time allows a woman to get enough bed rest so that the uterus can begin to return to its pre-pregnant

size and weight. It is not necessary that the uterus be completely involuted before the average woman can return to work.

I would conclude that, therefore, the period of time the average woman is disabled by a normal pregnancy is no more than three weeks following delivery.

ANDRE E. HELLEGERS, M.D.
Andre E. Hellegers, M.D.

Subscribed and sworn to before me this 14th day of February 1973.

RUTH E. CRENSHAW
Notary Public

Washington, D. C. } ss.

AFFIDAVIT

[In Support of Equal Employment Opportunity Commission]

Dr. Elizabeth A. Crisp, being first duly sworn, deposes and says:

I am a member of the American Board of Obstetrics and Gynecology and have held that post since 1963. I am also a Fellow of the American College of Obstetrics and Gynecology and a Fellow of the American College of Surgeons. I am the Chairman of the Education Committe, Columbia Hospital, Washington, D. C. I am also engaged in the private practice of medicine as an obstetrician and gynecologist and have been so engaged since 1960. I am licensed to practice in Washington, D. C., Louisiana, Virginia, Maryland, and California. In addition to my M.D. degree, I hold a teaching position at the George Washington University Medical School.

As a practicing obstetrician and gynecologist for over 14 years, I have had considerable direct personal experience in attending pregnant women. In my judgment, the average woman is disabled by pregnancy for only a short period of time. Unless her job involves heavy lifting on a regular basis, a woman in good health with a normal pregnancy is physically able to continue her employment until the start of labor.

In addition, after childbirth, a woman whose delivery has been uncomplicated may return to work from three to six weeks after delivery. This is the length of time it normally takes for the uterus to return to its normal size and weight. Many of my patients resume their normal activities within three or four weeks; and six weeks is a conservative estimate.

It is my conclusion, therefore, that the period of time the average woman is disabled by a normal pregnancy is no more than three to six weeks following childbirth.

ELIZABETH A. CRISP
Elizabeth A. Crisp, M.D.

Washington, D.C.

Subscribed and sworn to before me on this 14th day of February, 1973.

W. B. HOOVER
My Commission Expires April 30, 1974

AFFIDAVIT

[IN SUPPORT OF MOTION TO DISMISS]

I WILLIAM D. SMITH, being first duly sworn, depose and say:

I am a Fellow of the Society of Actuaries and a member of the American Academy of Actuaries.

I am now, and have been for fourteen years, a consulting actuary with the firm of Milliman and Robertson, Inc. 1 Kearny Street, San Francisco, California. In that capacity I have done work on a consulting basis for life insurance firms, managers of pension plans and for the California Department of Human Desources Development. I was previously employed for a period of eight years by Prudential Insurance Company, Newark, New Jersey on its actuarial staff. In these positions I have had an opportunity to gain familiarity with actuarial data related to disability questions.

Attached hereto as Exhibit A is a table entitled "1966 Loss Ratio (Benefits ÷ Premium)" prepared by the California Department of Human Resources Development which shows statistics related to disability payments compiled by age, sex, and annual earnings. From this table it can be seen that in every age, the ratio of cost to contributions for female workers is significantly greater than for male workers.

Attached hereto as Exhibit B is a table entitled "Claimants as a Percent of Workers 1966" also prepared by the California Department of Human Resources Development which shows that the percentage of women in the work force who file disability claims is greater than the percentage of men who do.

Attached hereto as Exhibit C is a copy of a document entitled "Table 5, Total Disability Loss-of-Time Experience, 1966-1967, Limited to First Year of Benefit Period," from the "Reports of Mortality and Morbidity" published by the Society of Actuaries. The portion of this table which is relevant here is outlined in red. The "7-Day Elimination Period" is the schedule comparable to the state disability insurance plan which pays no benefits for the first seven days of disability. The "Male Occ. Group I" and "Female Occ. Group I" are comparable groups. This table shows that both the annual claim rate and the annual claim cost are greater for females than for males by significant amounts.

Each of these three schedules furnishes the most recent data available to me at this time, since these studies are updated at about five year intervals.

These figures all confirm our experience: that in every case of sickness or disability benefits, females cost more than males.

WILLIAM D. SMITH
William D. Smith, F.S.A.

Subscribed and sworn to before me this 21st day of February, 1973.

JANET S. YAMAMURA
Notary Public for the
State of California

Notary Seal

1966 LOSS RATIO

(Benefits ÷ Premium)

Annual Earnings	Total	Under 40	40-44	45-49	50-54	55-59	60 and Over
Total Workers	.771	.454	.770	.905	1.059	1.291	1.888
Under $3000	1.282	.750	1.908	2.218	2.383	2.620	2.546
$3000-$3599	1.143	.670	1.293	1.495	1.967	1.994	2.267
3600- 4099	1.111	.615	1.242	1.652	1.853	1.809	2.808
4100- 4299	1.121	.608	1.486	1.737	1.679	1.555	2.724
4300- 4599	1.014	.572	1.485	1.414	1.463	1.487	2.228
4600- 5099	1.008	.585	1.142	1.560	1.681	1.350	2.166
5100- 5599	.916	.485	1.137	1.319	1.298	1.322	2.226
5600 and over	.561	.302	.498	.592	.743	1.021	1.541
Male Workers	.639	.358	.565	.678	.866	1.181	1.854
Under $3000	1.055	.588	1.575	1.963	2.092	2.606	2.499
$3000-$3599	.937	.547	.943	1.145	1.567	2.188	2.188
3600- 4099	.917	.490	.971	1.237	1.455	1.643	3.005
4100- 4299	.975	.533	1.183	.978	1.184	1.693	3.651
4300- 4599	.885	.483	1.222	1.108	1.072	1.542	2.482
4600- 5099	.936	.513	.904	1.277	1.689	1.372	2.467
5100- 5599	.817	.404	1.149	1.058	1.139	1.190	2.299
5600 and over	.529	.278	.445	.545	.718	1.013	1.568
Female Workers	1.182	.757	1.399	1.566	1.659	1.633	1.992
Under $3000	1.523	.945	2.145	2.376	2.604	2.631	2.612
$3000-$3599	1.338	.810	1.542	1.725	2.249	1.860	2.355
3600- 4099	1.304	.760	1.417	1.923	2.192	1.971	2.587
4100- 4299	1.261	.691	1.654	2.461	2.464	1.449	1.920
4300- 4299	1.159	.680	1.710	1.690	1.830	1.419	1.878
4600- 5099	1.094	.681	1.322	1.861	1.674	1.320	1.650
5100- 5599	1.066	.630	1.126	1.545	1.492	1.554	2.051
5600 and over	.823	.546	.905	.894	.907	1.077	1.360

Exhibit A

CLAIMANTS AS A PERCENT OF WORKERS

1966

Annual Earnings	Total	Age: Under 40	40-44	45-49	50-54	55-59	60 and Over
Males	6.18	3.94	7.25	8.09	9.61	11.42	12.09
Under $3000	2.97	2.07	4.53	5.10	5.59	6.59	5.38
$3000-$3599	6.50	4.80	7.08	7.12	9.66	11.58	11.64
3600- 4099	7.38	5.27	8.17	8.44	10.20	10.90	17.47
4100- 4299	7.81	5.70	8.51	8.54	8.67	10.00	21.88
4300- 4599	8.13	5.72	9.55	9.37	10.25	12.37	17.18
4600- 5099	9.03	6.55	9.74	11.53	12.92	11.26	17.26
5100- 5599	9.11	6.30	12.43	11.79	10.86	12.12	17.32
5600 and over	8.31	5.64	7.82	8.76	10.78	13.29	17.29
Females	7.55	4.93	10.54	11.65	12.41	11.97	10.28
Under $3000	5.00	3.42	7.67	8.17	8.93	8.97	6.79
$3000-$3599	11.67	8.33	13.00	14.11	17.99	15.22	16.98
3600- 4099	12.52	8.82	13.61	17.96	18.13	16.61	19.42
4100- 4299	12.88	8.67	17.39	23.84	18.70	12.45	16.08
4300- 4599	13.10	9.07	18.33	17.41	20.23	15.98	15.25
4600- 5099	12.78	8.97	14.13	21.73	18.70	15.52	15.00
5100- 5599	12.72	8.94	14.92	16.69	16.34	12.20	18.68
5600 and over	11.23	8.44	12.55	12.39	12.58	13.80	13.89

Exhibit B

TABLE 5

[Edited to exclude irrelevant data]

TOTAL DISABILITY LOSS-OF-TIME EXPERIENCE
1966-67, LIMITED TO FIRST YEAR OF BENEFIT PERIOD

7-DAY ELIMINATION PERIOD

Attained Age	Female Group I: No. Claims	Annual Claim Rate	Claim Duration (Months)	Annual Claim Cost*	Male Occ. Group I: No. Claims	Annual Claim Rate	Claim Duration (Months)	Annual Claim Cost*
20-29	272	.099	1.21	.120	857	.078	1.14	.089
30-39	564	.123	1.65	.203	2,589	.080	1.30	.104
40-49	1,242	.146	1.83	.267	4,555	.096	1.58	.152
50-59	1,180	.159	1.88	.299	5,111	.126	1.98	.250
60-69	89	.168	2.02	.340	1,779	.148	2.56	.379

*Per $1 of monthly income benefit.

OPINION GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND INJUNCTIVE RELIEF AND DISSENTING OPINION OF JUDGE WILLIAMS

In the United States District Court
for the Northern District of California

CAROLYN AIELLO, individually and on behalf of all others similarly situated, *Plaintiff,* vs. SIGURD HANSEN, as Director of the State Department of Human Resources Development, *Defendant.*	Civ. No. C-72-1402 SW
AUGUSTINA D. ARMENDARIZ, ELIZABETH B. JOHNSON, JACQUELINE JARAMILLO, et al., individually and on behalf of all other women similarly situated, *Petitioners,* vs. SIGURD HANSEN, as Director of the State Department of Human Resources Development, *Respondent.*	Civ. No. C-72-1547 SW

Before: DUNIWAY, Circuit Judge, WILLIAMS and ZIRPOLI, District Judges.

OPINION

[The majority and dissenting opinions below are printed in the Appendix to the Jurisdictional Statement at pages A-1 through A-28.]

JUDGMENT

In the United States District Court
for the Northern District of California

Filed Jun 19 1973
Clerk, U.S. Dist. Court

CAROLYN AIELLO, individually and on behalf of all others similarly situated, *Plaintiff,* vs. SIGURD HANSEN, as Director of the State Department of Human Resources Development, *Defendant.*	Civ. No. C-72-1402 SW
AUGUSTINA D. ARMENDARIZ, ELIZABETH B. JOHNSON, JACQUELINE JARAMILLO, et al., individually and on behalf of all other women similarly situated, *Petitioners,* vs. SIGURD HANSEN, as Director of the State Department of Human Resources Development, *Respondent.*	Civ. No. C-72-1547 SW

JUDGMENT

[A copy of the District Court's Judgment is printed in the Appendix to the Jurisdictional Statement at pages A-29 and A-30.]

MOTION TO RECONSIDER AND SET ASIDE SUMMARY JUDGMENT

In the United States District Court
For the Northern District of California

CAROLYN AIELLO, individually and on behalf of all others similarly situated, *Plaintiff,* vs. SIGURD HANSEN, as Director of the State Department of Human Resources Development, *Defendant.*	Civ. No. C-72-1402 SW
AUGUSTINA D. ARMENDARIZ, ELIZABETH B. JOHNSON, JACQUELINE JARAMILLO, et al., individually and on behalf of all other women similarly situated, *Petitioners,* vs. SIGURD HANSEN, as Director of the State Department of Human Resources Development, *Respondent.*	Civ. No. C-72-1547 SW

MOTION TO RECONSIDER AND SET ASIDE SUMMARY JUDGMENT

[A copy of Motion to Reconsider and Set Aside Summary Judgment, with accompanying Affidavit of Joanne Condas is printed in the Appendix to the Jurisdictional Statement at pages A-34 through A-38.]

OPINION OF CALIFORNIA COURT OF APPEAL

In the Court of Appeal of the State of California
Second Appellate District

Division Two
2d Civil No. 40694

(Sup. Ct. No. C 19074)

Gail E. Rentzer,
Petitioner and Appellant,

v.

California Unemployment Insurance Appeals Board Human Relations Agency,
Respondent.

Valley Presbyterian Hospital,
Real Party in Interest.

OPINION OF THE CALIFORNIA COURT OF APPEAL

[The text of the opinion of the Court of Appeal of the State of California is printed in the Appendix to the Jurisdictional Statement at pages A-44 through A-48.]

United States District Court
for the Northern District of California

Filed—Aug—7 1973
Clerk, U. S. Dist. Court

Carolyn Aiello, etc., *Plaintiff,* vs. Sigurd Hansen, etc., *Defendant.*	No. C-72-1402 SW
Augustina D. Armendariz, et al., *Petitioners,* vs. Sigurd Hansen, etc., *Respondent.*	No. C-72-1547 SW

ORDER DENYING MOTION TO RECONSIDER

The motion of defendant Sigurd Hansen, Director of the State Department of Human Resources Development, to reconsider and set aside the judgment entered in the above numbered causes on June 15, 1973, is denied.

Dated: July 31, 1973

/s/ Ben. C. Duniway
United States Circuit Judge

United States District Judge

/s/ Alfonso J. Zirpoli
United States District Judge

In the United States District Court
for the Northern District of California

Filed—Aug—7 1973
Clerk, U. S. Dist. Court

Carolyn Aiello, etc., *Plaintiff,* vs. Sigurd Hansen, etc., *Defendant.*	No. C-72-1402 SW
Augustina D. Armendariz, et al., *Petitioners,* vs. Sigurd Hansen, etc., *Respondent.*	No. C-72-1547 SW

MEMORANDUM

[The Memorandum opinion of Judge Williams which would have granted rehearing is printed in the appendix to the Jurisdictional Statement at pages A-32—33]

In the United States District Court
For the Northern District of California

Filed—Aug 13 9 20 AM '73

Carolyn Aiello, individually and on behalf of all others similarly situated, *Plaintiff,* vs. Sigurd Hansen, as Director of the State Department of Human Resources Development, *Defendant.*	Civ. No. C-72-1402 SW
Augustina D. Armendariz, et al., individually and on behalf of all other women similarly situated, *Petitioner,* vs. Sigurd Hansen, as Director of the State Department of Human Resources Development, *Respondent.*	Civ. No. C-72-1547 SW

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

Notice is hereby given that Dwight Geduldig, successor to Sigurd Hansen as Director of the Department of Human Resources Development of the State of California, defendant above named, hereby appeals to the United States Supreme Court from the final judgment of the three-judge

district court filed herein on June 15, 1973, and from the order denying defendant's motion to reconsider filed herein on August 7, 1973.

This appeal is taken pursuant to 28 U.S.C. sections 1253 and 2101(b).

Dated: August 13, 1973.

Respectfully submitted,

Evelle J. Younger, Attorney General of the State of California

Elizabeth Palmer
Assistant Attorney General

/s/ Joanne Condas
Joanne Condas
Deputy Attorney General
Attorneys for Defendants

In the United States District Court
for the Northern District of California

AFFIDAVIT IN SUPPORT OF MOTION TO STAY INJUNCTION

I, JOANNE CONDAS, being duly sworn, depose and say:

1. I am attorney for the defendant. I have been in charge of this litigation since its inception and am personally familiar with the facts herein stated.

2. The judgment of this Court entered June 15, 1973, requires that defendant process and pay not only the claims for disability insurance of the named plaintiffs but also the subsequent claims of all female workers for pregnancy disability. Such claims were previously excluded, and the addition of this large category of claims creates a financial crisis for the fund.

3. Defendant has submitted evidence to show that the disability fund has in the past paid out virtually all the funds received, even with pregnancy excluded. This evidence was not disputed. Defendant has also submitted evidence that adding pregnancy coverage would increase claims against the fund approximately 36%, necessitating increased withholding rates or reduced benefit rates or both. This evidence was also not disputed.

4. Defendant's estimate of the cost of adding pregnancy benefits was based upon an average duration of disability of 15 weeks. Defendant's experience since June 15, 1973, confirms the accuracy of that estimate. To date a total of 714 claims have been received. A random sampling of 131 of these claims revealed an average disability claim period of 103 days, or approximately 15 weeks.

5. Approximately 245 of the 714 claims received show that defendant's estimate of the duration of disability was

too conservative. Attached hereto are 53 such claims which show an average duration of 23 weeks. In addition to the extended period of disability claimed, another fact is significant: it is clear that the medical community determines the existence of disability caused by pregnancy on a different and more lenient basis than other disabilities. In all 53 cases, the claimants have readily certified that their pregnant patients are disabled from working when *no medical basis for such certification is disclosed.*

6. I have also ascertained from the administrators of the disability insurance fund that the cost of paying claims under the *Rentzer* decision can be absorbed by the fund without the need for additional financing, although this additional cost will diminish the fund's reserves. On the other hand, payment of all pregnancy claims will cost approximately $131 million in benefits. This cost is not the whole cost, since it does not include administrative expense. It is anticipated that 144,000 more claims would be submitted each year if normal pregnancy were covered. The fund would require approximately 140 additional staff members to process such claims.

Executed at San Francisco, California, this 26th day of July, 1973.

JOANNE CONDAS
Joanne Condas
Deputy Attorney General

Subscribed and sworn to before
me this 26th day of July, 1973.

CLAUDIA V. TARVER
Notary Public in and for said
County and State

(Notary Seal)

EXPLANATORY NOTES

[attached to affidavit, supra]

The documents attached are copies of the actual disability claims submitted, except that all information which would identify the claimant, her physician or her employer has been obliterated to protect the confidentiality of the claim filed. The claims specifically referred to below have been numbered serially to permit ready reference. We draw the Court's attention to such items as:

1. Claim No. 1. Neither the claimant nor her physician described any symptoms of pregnancy amounting to disability. The physician nevertheless concludes: "The patient is unable to continue working in her normal occupation as the distance is too great for her to drive to and from work, plus the pressure and tension related to her position is unwise to undergo at this time." Claimant's occupation is medical receptionist. The expected period of her disability is six months.

2. Claim No. 2. Indicates a period of disability of four months from the date last worked, 4/6/73 to the estimate of return-to-work date given by claimant's physician. The doctor's comment is: "Pt is having a very normal pregnancy [without] any special problem."

3. Claim No. 3 indicates a period of disability from June 19, 1973, the last date worked, to April 20, 1974, a total of nine months. Neither claimant nor her physician note any disabling condition except pregnancy.

4. Claim No. 4 estimates a 6-month period of disability for "cyesis," Stedman's Medical Dictionary defines cyesis as "pregnancy."

5. Claim No. 5 points up one aspect of the problem which makes pregnancy unique: this application for disability is based not on any ailment of the claimant but

upon the possible effect upon her child of continuing to work around chemicals.

6. Claim No 6 estimates an approximate disability period of *ten months* for uneventful pregnancy.

7. Claim No. 7. In this case a routine follow-up letter directed to the claimant's physician elicited no additional information upon which a bona fide claim for disability could be predicated. The doctor merely states: "Patient is claiming disability on the basis of her pregnancy." The period claimed is nine months.

8. Claim No. 8 explains a six-month disability claim. "Pt not able physically to cope with responsibilities of work as pregnancy progresses."

9. Claim No. 9 frankly asks for "maternity leave" and states her period of disability to be four months.

It should be noted that on virtually all claims in which some complication relating to pregnancy is noted, such as nausea, which complication might well disappear prior to the end of the pregnancy, disability is nevertheless computed to the end of the full term of pregnancy plus the traditional six weeks after delivery.

[For brevity, the 53 claim forms have been omitted]

AFFIDAVIT OF BETTY KATHLEEN KIDDER

[In opposition to motion for stay]

I was, from November, 1968 until August 1, 1973, a claims examiner for the Disability Insurance office in San Francisco.

As of my last day at work, disability benefit applications of women disabled by complications of pregnancy were being processed but not paid. Applications of women disabled by normal birth and delivery were being held but were not being processed nor paid, nor were claimants notified of receipt of form.

It is my understanding that the Director of the Department of Human Resources Development is arguing for purposes of this lawsuit that disability applications received from women with normal pregnancies reveal that unduly long disability periods are predicted by many of the applicants' physicians.

As stated above, these applications are not being processed by the State Disability Insurance offices. The Disability offices have an established procedure, once processing has begun, to weed out abuses of the Disability Program. I believe that many of the excesses claimed by H.R.D. will be corrected by this procedure, which is as follows:

When it appears that a disability claim is questionable, the first step taken under this procedure is a field visit to the home of the disability applicant to determine first-hand if the applicant appears to be disabled. If the doubt as to the exitsence, severity or duration of the disability is not dispelled by the field visit, the applicant's physician may be notified that a follow-up questionnaire is necessary. Should doubts persist after the applicant's physician's follow-up, the applicant is required to see another doctor from the Independent Medical Examiner's Board. This Board is composed of private physicians who have agreed to make themselves available to resolve disability disputes arising under the State Disability Insurance Program.

Once claims arising from normal pregnancies are subjected to this process, many of the "abuses" predicted by Sigurd Hansen for purposes of the lawsuit should disappear.

An additional measure which might be conveniently and economically taken by the State Disability Insurance program to prevent abuses would be a pamphlet to physicians,

provided with the physician's report form, clarifying the physicians' role and duty in such cases. Such a pamphlet might set forth the difference between maternity benefits and disability benefits and ask that physicians exercise their medical judgment to distinguish between the two, recommending disability benefits only in the latter situations.

Another alternative would be a separate physician's form in pregnancy cases (as are now provided to Christian Science Practitioners) with questions especially designed to weed out non-disabilities in the pregnancy context.

I would also point out that HRD's sample is thus far small and may not be representative. If the San Francisco office is any indication, the applications for benefits by pregnant women is far lower than predicted.

Dated: 8-21-1973

BETTY KATHLEEN KIDDER
Betty Kathleen Kidder

Subscribed and sworn before me this 21st day of August, 1973

MYRTLE O. BENNETT
Notary Public

Notary Seal

Supreme Court of the United States

No. 73-640

Dwight Geduldig, etc.,

Appellant,

v.

Carolyn Aiello, et al.

APPEAL from the United States District Court for the Northern District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is set for oral argument.

December 17, 1973

In the Supreme Court of the United States

FILED
OCT 12 1973
MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1973

No. 73-640

DWIGHT GEDULDIG,
Appellant,

vs.

CAROLYN AIELLO,
individually and on behalf of
all others similarly situated,
Appellees.

DWIGHT GEDULDIG,
Appellant,

vs.

AUGUSTINA D. ARMENDARIZ,
ELIZABETH B. JOHNSON,
JACQUELINE JARAMILLO,
individually and on behalf of all
other women similarly situated,
Appellees.

Consolidated Cases on Appeal from the United States District Court for the Northern District of California

Jurisdictional Statement

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. .....

DWIGHT GEDULDIG,

Appellant,

vs.

CAROLYN AIELLO,
individually and on behalf of
all others similarly situated,

Appellees.

DWIGHT GEDULDIG,

Appellant,

vs.

AUGUSTINA D. ARMENDARIZ,
ELIZABETH B. JOHNSON,
JACQUELINE JARAMILLO,
individually and on behalf of all
other women similarly situated,

Appellees.

Consolidated Cases on Appeal from the United States District Court for the Northern District of California

---

Jurisdictional Statement

Appellant Dwight Geduldig, Director of the California Department of Human Resources Development,[1] appeals

---

1. Dwight Geduldig has succeeded Sigurd Hansen, defendant below, as Director of the California Department of Human Resources Development.

from the judgment of a three-judge court convened in the Northern District of California declaring unconstitutional and enjoining enforcement of the third sentence of California Unemployment Insurance Code (U.I.C.), section 2626, which excludes pregnancy from coverage under the state disability insurance program, and from an order of the three-judge court denying Appellant's motion to reconsider and set aside the Court's judgment, entered on August 7, 1973. Appellant submits this statement to establish the jurisdiction of the Court and the substantiality of the federal question presented.

OPINIONS BELOW

The opinion of the three-judge court declaring unconstitutional the third sentence of section 2626 of the California U.I.C. is not yet reported. No opinion was rendered by the majority of the Court in denying Appellant's motion to reconsider and set aside the judgment of the Court. Judge Williams wrote a dissenting memorandum which is not yet reported. Copies of the majority and dissenting opinions and the judgment of the Court declaring unconstitutional the third sentence of section 2626 of the California U.I.C. are attached hereto as Appendix "A" and "B" respectively. Copies of the Court's order denying Appellant's motion to reconsider and set aside the Court's judgment and Judge Williams' dissenting memorandum are attached hereto as Appendix "C" and "D" respectively.

JURISDICTION

These consolidated actions were brought by Appellees on behalf of themselves and all other pregnant women similarly situated, for injunctive and declaratory relief pursuant to Title 42 United States Code section 1983, and Title 28 United States Code sections 2201 and 2202. Jurisdiction

of the District Court was invoked pursuant to Title 28 United States Code sections 1343(3) and (4). Appellees sought a declaration that the third sentence of California U.I.C. section 2626, which excludes pregnancy from coverage under the state disability insurance program, is an unconstitutional denial to women of equal protection of the laws, contrary to the Fourteenth Amendment and also sought an injunction against further enforcement of the pregnancy exclusion.[2] A petition in intervention was filed by several labor organizations on behalf of their female members seeking the same substantive relief as Appellees but also asking that relief be granted, and disability benefits for pregnancy paid, retroactively to December 14, 1969.[3] Order granting the petitioners intervenor status was entered January 30, 1973.

The court heard the matter on cross motions for summary judgment and on May 31, 1973, two judges of the specially-convened three-judge District Court held the pregnancy exclusion to be an unconstitutional denial of equal protection to women and enjoined appellant from further enforcing the third sentence of section 2626. The decision is silent on the question of retroactivity. Judgment was entered June 15, 1973.

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2. Since appellees sought an injunction against enforcement of a state statute, a three-judge court was convened under Title 28 United States Code sections 2281 and 2284.

3. The intervenors are United Automobile, Agricultural, Implement and Aerospace Workers of America (UAW); United Brotherhood of Carpenters and Joiners of America, AFL-CIO; California State Council of Carpenters; United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO; International Ladies Garment Workers Union, AFL-CIO; Printing Specialties and Paper Products Union District Council No. 2; Social Services Employees Union, Local 535; Alameda County Central Labor Council, AFL-CIO; and Contra Costa County Labor Council, AFL-CIO, on behalf of all of the affiliated Unions of each of the above labor organizations representing the women members of said unions and on behalf of all other women similarly situated. No explanation was given by intervenors for selection of the date of December 14, 1969 in connection with retroactivity.

Appellant filed a timely motion for reconsideration, attached hereto as Appendix "E." This motion was based upon a change in state law, discussed below in more detail, which in effect narrowed the statute to exclude only "maternity benefits" for normal pregnancy and eliminated the exclusion for complications. The District Court, again in a two-to-one decision, denied rehearing on August 7, 1973. Appellant's Notice of Appeal to this Court was filed in the United States District Court for the Northern District of California on August 13, 1973. A copy of the Notice of Appeal is attached hereto as Appendix "F."

The jurisdiction of the Supreme Court of the United States to hear this direct appeal is conferred by Title 28 United States Code sections 1253 and 2101(b). *Jefferson v. Hackney,* 406 U.S. 535 (1972); *Dandridge v. Williams,* 397 U.S. 471 (1970).

THE STATUTE INVOLVED

The specific statute challenged is California Unemployment Insurance Code, section 2626 (Stats. 1953, c. 308 p. 1531), which reads as follows:

> "'Disability' or 'disabled' includes both mental or physical illness and mental or physical injury. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work. In no case shall the term 'disability' or 'disabled' include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter."

Other pertinent statutory provisions of the disability insurance program are set forth in Appendix "G" hereto.

QUESTION PRESENTED

Does the State of California violate the equal protection clause of the Fourteenth Amendment of the United States Constitution by denying monetary benefits to women for normal pregnancy pursuant to a state disability insurance program designed to provide benefits for illness or injury?

STATEMENT OF THE CASE

This is an appeal from a judgment of a three-judge district court for the Northern District of California (one judge dissenting) granting summary judgment against the State of California in consolidated actions by Appellees which sought a declaration that section 2626 of the California U.I.C., which does not provide benefits for pregnancy, constitutes a denial of equal protection of the laws contrary to the Fourteenth Amendment, and sought an injunction against further enforcement of that provision.[4] Appellant contended that the California code section under review represented an appropriate legislative determination by the state not to include pregnancy within a disability insurance program designed to provide benefits for illness or injury, because the condition of pregnancy is clearly distinguishable from illness or injury, and because including maternity benefits coverage within the disability insurance program would disproportionately channel the finite funds available to a small percentage of the work force and would ultimately

4. The action on behalf of Carolyn Aiello and others was filed in the U.S. District Court for the Northern District of California on July 31, 1972. The action on behalf of Augustina Armendariz and others was commenced in the Supreme Court of the State of California on August 16, 1972, was removed to U.S. District Court on August 24, 1972, and was ordered consolidated with the Aiello case, to proceed under the Aiello title, on December 5, 1972. Appellees Aiello and Johnson suffered ectopic pregnancies; Appellee Armendariz suffered a miscarriage. All three applied for disability insurance benefits, which were denied. Appellee Jaramillo's claim is unclear. She was eight months pregnant at the commencement of this action and had experienced no complications of pregnancy. She sought benefits for the period during which she would be incapacitated by the delivery of her child. However, she has never filed a claim for disability benefits, so far as is known to Appellant.

destroy the solvency of the program as a whole. The District Court held, however, that the failure to provide benefits for pregnancy was "not based upon a classification having a rational and substantial relationship to a legitimate state purpose" and was therefore unconstitutional.[5] The District Court also noted that "[t]he search for the purposes that actuated the legislature is a difficult one." As will be demonstrated, the exclusion of pregnancy has a very substantial relationship to a legitimate state purpose. Moreover, the history of the legislation and of the exclusion of pregnancy from it is very easy to find. The dissent of Judge Williams discusses the entire historical background of the disability insurance program at length.[6] The majority simply ignored it.

While this case was pending before the District Court, and unknown to the Court or to the litigants, the California Court of Appeal for the Second Appellate District was considering a case entitled *Rentzer v. California Unemployment Insurance Appeals Board* which also involved construction of section 2626 of the California Unemployment Insurance Code. The *Rentzer* case was commenced by a petition for writ of mandate in Los Angeles County Superior Court on January 19, 1972. Gail Rentzer had suffered an ectopic pregnancy which necessitated surgery to save her life. As a consequence, she was unable to work for six weeks. When the California Unemployment Insurance Appeals Board denied her disability benefits for the first 28 days of her six-week disability, she petitioned the Superior Court for a writ mandating the California Unemployment Appeals Board to provide her with full disability benefits. Ms. Rentzer appealed the denial of her petition to

5. Appendix A-17.
6. Appendix A-22-26.

the Court of Appeal. On May 29, 1973, the Court of Appeal rendered its opinion reversing the judgment of the Superior Court. In so doing, the Court, citing with approval an earlier California Court of Appeal decision, *Clark v. California Emp. Stab. Com.*, 166 Cal.App.2d 326 (1958), construed the third sentence of section 2626 of the California U.I.C. to exclude only "maternity benefits," that is, benefits for normal gestation and delivery. The California Court of Appeal decision in *Rentzer v. California Unemployment Insurance Appeals Board* is reported at 32 Cal. App.3d 604 (1973). A copy of that decision is attached as Appendix "H".

Following the *Rentzer* decision, the Department of Human Resources Development, on June 18, 1973, issued administrative guidelines attached as Appendix "I", excluding from coverage under section 2626 of the California U.I.C., only "maternity benefits"—*viz.*, hospitalization and disability benefits for normal delivery and recuperation.[7]

---

7. On October 1, 1973, Assembly Bill 809 of the 1973 session was signed and is effective January 1, 1974. It amends the challenged section to read as follows:

"'Disability' or 'disabled' includes both mental or physical illness, mental or physical injury, and, to the extent specified in Section 2626.2, pregnancy. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work . . . .

[Section 2626.2]

"Benefits relating to pregnancy shall be paid under this part only in accordance with the following:

"(a) Disability benefits shall be paid upon a doctor's certification that the claimant is disabled because of an abnormal and involuntary complication of pregnancy, including but not limited to: puerperal infection, eclampsia, caesarean section delivery, ectopic pregnancy, and toxemia.

"(b) Disability benefits shall be paid upon a doctor's certification that a condition possibly arising out of pregnancy would disable the claimant without regard to the pregnancy, including but not limited to: anemia, diabetes, embolism, heart disease, hypertension, phlebitis, phlebothrombosis, pyelonephritis thrombophlebitis, vaginitis, varicose veins, and venous thrombosis." (Stats 1973, C. 1026)

Based upon the substantial change in state law brought about by *Rentzer* and the ensuing revision of the state disability program, Appellees Aiello, Johnson, and Armendariz would be entitled to benefits for their disabilities arising from complications of pregnancy. The only party still to be denied benefits would be Appellee Jaramillo who had a normal pregnancy and delivery. In light of this significant alteration of the issue before the court, Appellant's timely motion for reconsideration should have been granted. From the Judgment and subsequent Order denying reconsideration, Appellant brought this appeal.

THE QUESTION IS SUBSTANTIAL

The decision of the court below, in the name of equal protection of the laws, decreed that the physiological condition of normal pregnancy must be equated with conditions of illness and injury under the California U.I.C. By declaring that normal pregnancy shall be treated as an illness or injury[8] the district court not only ignored medical, actuarial and fiscal evidence of the dissimilarity of these conditions but also rejected the State's attempt to differentiate between medically discreet conditions in an area of public welfare legislation. The effect of this decision will be to frustrate the purposes of the legislation and the fiscal integrity of the State disability insurance program. In reaching this result, the lower court failed to apply the principles contained in this Court's most recent opinions defining the concepts of equal protection of the laws. *See,*

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8. In the light of the district court's denial of Appellants' timely motion for reconsideration based upon the California court's decision in *Rentzer, supra,* which construed section 2626, U.I.C. to exclude benefits only for normal pregnancy, the judgment below must be read to equate normal pregnancy with disabilities arising from illness and injury.

e.g., United States v. Kras, 409 U.S. 434, (1973); *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Reed v. Reed*, 404 U.S. 71 (1971); *Dandridge v. Williams*, 397 U.S. 471 (1970).

As mentioned above, the history of the disability insurance program is not hard to find. When the disability insurance program was first proposed by Governor Earl Warren in 1946, an integral part of the proposal was the use of the 1% of wages then being paid by employees into the unemployment insurance plan but not needed for that purpose to fund the disability insurance plan. The Governor's message to the State Legislature revealed his concern for maintaining the solvency of the fund while providing low-cost coverage:

> "[W]e have had eight years of experience and this experience demonstrates that disability compensation can be made available to workers without affecting the solvency of the fund and without the necessity for an additional contribution.
>
> • • •
>
> "It is not possible for employees to obtain from private insurance companies protection against loss of wages or salary during sickness as adequately or cheaply as the protection could be obtained by diverting their 1% contribution for the support of a Disability Benefits Program.
>
> • • •
>
> "Based on Rhode Island's actual experience, and with allowances for differences between the Rhode Island Law and the program now under consideration for California, the cost in California would approximate $35,000,000 a year.
>
> "This cost could be met entirely out of the 1 per cent employee contribution."[9]

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9. *California Senate Journal*, June 23, 1946, pp. 228-229.

The Rhode Island experience to which the Governor refers is instructive. The Rhode Island plan did not initially exclude pregnancy. Between 1944, when the Rhode Island plan began, and mid-1946, the program incurred a deficit of $1.5 million. In 1946, Rhode Island placed limits on pregnancy benefits.[10]

Since the entire California plan has been based on the low cost coverage available by exclusion of normal pregnancy, the decision of the lower court will have a very significant impact on the program. It will also affect the disability insurance plans of other states which differentiate between pregnancy and illness or injury.[11] Further, resolution of the medical and insurance treatment of pregnancy will have massive impact on public and private employer disability plans. Several cases are now proceeding in the lower federal courts involving such plans. *E.g., Newmon v. Delta Air Lines, Inc.*, ... F.2d ....., 5 EPD ¶ 8500 (5th Cir. 1973); *Gilbert v. General Electric Co.*, No. 142-72-R (E.D. Va. Filed March 15, 1973); *Communication Workers v. Illinois Bell Tel. Co.*, No. 73-C-959 (N.D. Ill. Filed April 13, 1973); *Communication Workers v. Southern Bell Tel. & Tel.*, No. 18328 (N.D. Ga. Filed May 17, 1973); *Grogg v. General Motors Corp.*, 73 Civ. 63 (S.D. N.Y.).[12]

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10. See "Disability Compensation For the Disabled Sick" by Nathan Sinai, Published by School of Public Health, University of Michigan (1949), pp. 29-31 for a discussion of this and other factors which resulted in differences in California's plan.

11. The disability insurance programs of New Jersey, New York, and Rhode Island treat pregnancy differently from other disabilities.

12. *See* the Memorandum, Amicus Curiae, of the United States recently filed in *Cleveland Bd. of Educ. v. La Fleur*, No. 72-777; *Cohen v. Chesterfield Cty. Sch. Bd.*, No. 72-1129, which addresses the separate issue of whether the Fourteenth Amendment prohibits discharge and mandatory leave for pregnant school teachers.

Appellant suggests that even if this Court were to determine that the public employers in *Cohen* and *LaFleur* cannot demonstrate a compelling or even rational basis for terminating pregnant em-

The California U.I.C. establishes a comprehensive legislative program designed to protect against wage loss caused by involuntary unemployment arising out of illness or injury. While the unemployment insurance program is funded by employer contributions, the disability insurance program is entirely supported by *employee* contributions which have a fixed statutory limit of 1% of earnings up to a maximum contribution of $85.00 per year.[13] Basic benefits under the disability plan are based on earnings, ranging from $25 to $105 per week, beginning the eighth day of disability. Basic benefits may continue for a maximum of 26 weeks. If an individual is hospitalized, basic benefits begin the first day and the person receives an additional benefit of $12 per day for a maximum of 20 days.

The annual cost of the disability plan is currently approximately $362.1 million, exclusive of pregnancy. This level of benefit payments results in an almost total utilization of the 1% contribution from employees' salaries. If pregnancy claims were added the annual payout from the fund would rise to $493.1 million, which is more that $100 million above the annual income of the fund.

The question is not only one of dollars, however, but of the proper characterization of normal pregnancy.

1. Normal Pregnancy Is Substantially Different from Illness or Injury

The exclusion of normal pregnancy from California's disability insurance program bears a rational and substantial relationship to the purposes of the legislation creating the disability fund—to compensate for physical and

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ployees or excluding them from employment for substantial periods of time, it is an entirely different proposition to argue that employees who can select their own period of leave must also be paid for that period of time when they have chosen to be absent for a *normal* pregnancy and delivery.

13. California U.I.C. section 984.

mental disabilities arising from illness or injury within the limited resources available from worker contributions. Reduced to its essence, Appellant's position is that there is no denial of equal protection of the laws in failing to provide wage continuation benefits for normal pregnancy when the disability program is addressed to conditions of illness and injury, particularly when the program as actually administered provides more benefits to women workers than to men, even without the addition of normal pregnancy.

As this Court reiterated in *Reed v. Reed, supra,* 404 U.S. at 75-76, the Equal Protection Clause "does not deny to States the power to treat different classes of persons in different ways." What it does prohibit is legislative classifications which are factually specious:

> A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a *fair and substantial relationship to the object of the legislation,* so that all *persons similarly circumstanced shall be treated alike.*"
> 404 U.S. at 76 (emphasis added).

Appellant suggests that the California statute under review fully meets this test. It differentiates between persons who are not "similarly circumstanced," and this differentiation bears a "fair and substantial relationship to the object of the legislation."

Even the most outspoken advocates of political and economic rights of women, who have supported the proposed Equal Rights Amendment to the United States Constitution, have recognized that equality does not mean sameness. For example, a memorandum of the Citizens' Advisory Council on the Status of Women, entitled *The Proposed Equal Rights Amendment to the United States Constitution* (1970) contains the following discussion:

"4. *Laws Which Could Not Possibly Apply to Both Sexes Because of the Difference in Reproductive Capacity.*

Laws which, as a practical matter, can apply to only one sex no matter how they are phrased, *such as laws providing maternity benefits* and laws prohibiting rape, would not be affected by the amendment. The extension of these laws to both sexes would be purely academic, since such laws would not apply differently if they were phrased in terms of both sexes. In these situations, the terminology of sex identification is of no consequence."

p. 13 (emphasis added).

The legislative history of the proposed Equal Rights Amendment is consistent:

"The legal principle underlying the Equal Rights Amendment (H.J. Res. 208) is that the law must deal with the individual attributes of the particular person and not with stereotypes of over-classification based on sex. However, the original resolution does not require that women must be treated in all respects the same as men. *Equality does not mean sameness.* As a result, the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex. For example a law providing for payment of the *medical costs of child bearing* could only apply to women. In contrast, if a particular characteristic is found among members of both sexes, then under the proposed amendment it is not the sex factor but the individual factor which should be determinative."

S. Rep. No. 92-689, p. 12 (emphasis added).

These comments on the meaning of sex differences and laws which recognize those differences are amply supported by actuarial, medical, and sociological authority on the

nature and consequences of pregnancy. As one eminent specialist has testified:

> Q. Is pregnancy a sickness or injury?
>
> A. No.
>
> Q. Could you give a medical definition of what pregnancy is in physical relationship?
>
> A. It is a normal biologic function. It should not be regarded as illness anymore than menstrual periods are regarded as an illness. An illness is when [a] bodily function is deranged, there is [a] malfunction of symptoms and pregnancy is, of course a normal biologic phenomena.[14]

The opinion that normal pregnancy is not a physical disability comparable to illness or injury is a widely-held view. For example, in "The Sick Role—Illness and Pregnancy," 6 Social Science and Medicine 561 (1972), at pages 568-571, the author, John B. McKinlay, Associate Professor of Sociology at Boston University, explains that pregnancy does not mesh with the concept of the "sick role," for these reasons:

> 1. It is considered statistically normal, in that most of the possible conceivers do conceive at some time. Cancer, coronary thrombosis and pneumonia are not, in this sense, normal "facts of life" or "natural vicissitudes."
>
> 2. Pregnancy is a normal biological function necessary for survival of the species. Sickness jeopardizes survival.
>
> 3. Pregnancy is normal because usually desirable. One often congratulates a woman who is pregnant, while those with sicknesses are not congratulated but are treated as abnormal and stigma often attaches.
>
> 4. A pregnant woman need not be motivated to "get

14. Testimony of Dr. Leo J. Dunn, Professor and Chairman of Obstetrics and Gynecology, Medical College of Virginia, quoted in respondent's brief to Supreme Court, pp. 12-13, in *Cohen v. Chesterfield, supra.*

well." The factor of motivation to recover is often crucial in restoration of health in real sickness cases.[15]

The factual difference between normal pregnancy and disabilities arising from illness or injury demonstrates that women experiencing a normal pregnancy are not "similarly circumstanced" when compared to men *and women* who are disabled for other physical or mental reasons.

2. To Include Benefits for Normal Pregnancy Would Frustrate the Legislative Purpose of the Disability Program and Contravene the Valid State Objective of Protecting the Fiscal Integrity of the Disability Fund

Nothwithstanding the district court's sweeping conclusion that fiscal considerations will not support legislative differentiations between normal pregnancy and illness or injury,[16] this Court has recognized the legitimacy of such State concerns "in 'the area of economics and social welfare.'" *Jefferson v. Hackney, supra,* 406 U.S. at 546; *Dandridge v. Williams, supra,* 397 U.S. at 487. Applying the *Reed* test of a "fair and substantial relation to the object of the legislation," it can be seen that the district court incorrectly rejected all of Appellant's arguments concerning cost, because the legislative history of this section makes it clear that cost to the *employees* who finance the program was the primary reason for the exclusion.

Moreover, actuarial data abundantly supports the validity of that legislative reasoning. As Judge Williams noted in his dissenting opinion, "Women contribute only 28% of withholdings but draw 38% of the benefit payments.

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15. In addition, there are numerous cases now pending in lower federal courts involving extensive medical evidence to the effect that pregnancy is not comparable to illness or injury. See p. 10, *supra.*

16. Appendix A-14.

Put another way, men receive $.89 per dollar contributed while women receive $1.37 per dollar contributed."[17]

These figures quoted by Judge Williams were based upon data furnished by Appellant from his agency's 1971 experience administering the disability insurance fund. The 1972 experience shows that men currently receive $.80 per dollar contributed while women receive $1.27 per dollar contributed. Appellant estimates, based on claims received to date, that adding pregnancy complications would result in women receiving $1.31 per dollar contributed. If normal pregnancy is included as well, the disparity becomes truly dramatic: women would receive $2.33 per dollar contributed compared to $.80 for men. Appellant submitted other actuarial data based on his agency's experience which showed that *in every age group* the ratio of cost to contributions for female workers is significantly greater than for men. This disparity is not unique to Appellant's program but is a well-known and well documented actuarial difference between the health and disability experiences of men and women. Appellant submitted data from the "Report of Mortality and Morbidity" published annually by the Society of Actuaries, which showed that both the annual claim rate and the annual claim cost are significantly greater for females than for males. These facts substantiate a legislative decision to structure the disability program in a fashion which would prevent a greater distortion in the share of benefits available to men and women.

Appellant also offered a statement issued July 13, 1973, by Herbert Denenberg, Insurance Commissioner of Pennsylvania before the Joint Economic Committee of the Congress at Hearings on The Economic Problems of Women in which Commissioner Denenberg said:

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17. Appendix A-19.

"Disability coverage poses a more difficult problem as the loss experience of women, even with pregnancy costs excluded, may run two and a half times higher than costs for men."[18]

The District Court did not consider any of this material relevant. The Court's explanation was that pregnancy disabilities cannot be excluded on the basis of cost, despite this Court's recognition of fiscal considerations when a state is attempting to administer a finite pool of public welfare resources.[19] *See Jefferson v. Hackney, supra,* 406 U.S. at 549.[20]

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18. Reasoning based upon the possible socially desirable objective of providing state assistance to pregnant employees, or the citizenry as a whole, cannot overcome factual evidence that the condition of normal pregnancy is not comparable to other conditions for which benefits are provided. See *Reed v. Reed, supra,* 404 U.S. at 75 (recognizing the immutable fact of differing longevity between the sexes). *See also,* Appellant's brief as Amicus Curiae in *Cohen* and *LaFleur, supra* at pp. 8-12.

19. The court cited *Shapiro v. Thompson,* 394 U.S. 618, 633 (1969), but made no effort to reconcile its reliance on *Shapiro* with footnote 10 from the same case, which says: "We are not dealing here with state insurance programs which may legitimately tie the amounts of benefits to the individual's contributions." 394 U.S. at 633.

20. Nor the mere fact that certain groups may be "disadvantaged" by the allocation enough to invalidate the legislative judgment. As this Court noted in *Jefferson v. Hackney, supra,* 406 U.S. at 548-49:

> The acceptance of appellants' [here, Appellees'] constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be. Few legislative efforts to deal with the difficult problems posed by current welfare programs could survive such scrutiny, and we do not find it required by the Fourteenth Amendment. [Citing *James v. Valtierra,* 402 U.S. 137 (1971)]

CONCLUSION

It is submitted that the District Court misapprehended the elements of equal protection required by the Fourteenth Amendment. The different treatment now accorded normal pregnancy under the California disability insurance plan is fully justified, by the well-documented acturial cost difference between men and women, by the fact that the physiological nature of normal pregnancy merits its exclusion under such a plan, and by the fact that the different treatment of normal pregnancy sustains the solvency of a fund created by employee contributions for disabilities arising from illness or injury. Appellant believes that the District Court erred; that the questions presented by this appeal are substantial and that they are of a nationwide importance.

FOR THE FOREGOING REASONS, PROBABLE JURISDICTION SHOULD BE NOTED.

Dated October 11, 1973.

Respectfully submitted,

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Appendix A

United States District Court
for the Northern District of California

rolyn Aiello, individually and on behalf of all others similarly situated, *Plaintiff,* vs. gurd Hansen, as Director of the State Department of Human Resources Development, *Defendant.*	No. C-72-1402 SW
gustina D. Armendariz, Elizabeth B. Johnson, Jacqueline Jaramillo, et al., individually and on behalf of all other women similarly situated, *Petitioners,* vs. gurd Hansen, as Director of the State Department of Human Resources Development, *Respondent.*	No. C-72-1547 SW

ore: DUNIWAY, Circuit Judge, WILLIAMS and ZIRPOLI, District Judges.

OPINION

POLI, District Judge.

Plaintiffs, on behalf of themselves and other women ilarly situated, challenge the provision of California mployment Insurance Code § 2626 which exempts preg-y-related work loss from the coverage of the state dis-ity insurance program until 28 days after the termina-

tion of pregnancy.[1] Each suffered a pregnancy-related disability, and solely because of § 2626, each was denied benefits. This treatment, plaintiffs argue, unconstitutionally discriminates against pregnant women. They ask that the court declare this portion of the statute invalid, enjoin the State Department of Human Resources Development from denying benefits on the basis of this provision, and require that the Department consider plaintiffs' applications for benefits as if the challenged provision did not exist. Because plaintiffs seek to enjoin the enforcement of a state statute, a three-judge court was convened pursuant to 28 U.S.C. § 2281. The parties have now filed cross-motions for summary judgment,[2] each agreeing that no relevant facts are in dispute.

I.

The California Unemployment Insurance Code establishes a comprehensive legislative scheme designed to provide protection against wage loss caused by involuntary unemployment. The disability insurance program, which is involved in this suit, provides benefits to persons unable to perform their customary work because of nearly any physical or mental condition; a complementary pro-

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1. California Unemployment Insurance Code § 2626:

"Disability" or "disabled" includes both mental or physical illness and mental or physical injury. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work. In no case shall the term "disability" or "disabled" include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter.

2. Defendant denominated his motion a motion to dismiss, but because it is accompanied by affidavits which the court considers, the court treats it as a motion for summary judgment. Fed. R. Civ. P. 12(b).

gram provides compensation to unemployed persons able to and available for work. Thus, the state has attempted to reduce to a minimum the suffering caused by involuntary unemployment of every type. Calif. Unemp. Ins. Code §§ 100, 2601.

The disability insurance program is wholly supported by employee contributions. At present, employees must contribute one percent of their salary up to a maximum of $85 per year. *Id.* §§ 984, 985, 2901. In order to be eligible to receive benefits, previous to the time of his disability an employee must have contributed one percent of a minimum income of $300 during a one year base period. *Id.* § 2652. Having satisfied this requirement, an employee is eligible to receive "basic benefits" varying between $25 and $105 per week, depending upon the amount earned during the base period, for a maximum of twenty-six weeks.[3] *Id.* §§ 2653, 2655. These benefits begin on the eighth day of disability, or, if the person is hospitalized, on the first day of hospitalization. *Id.* §§ 2627(b); 2802. While hospitalized, an employee is also eligible for "additional benefits" of $12 per day for a maximum of twenty days. *Id.* § 2801. The fund is protected against false claims by the requirement that claims be accompanied by the affidavits of a licensed medical practitioner attesting to the existence of a disability and by the requirement that an employee must submit to such reasonable examinations as the Department may require. *Id.* §§ 2627(c), (d), 2708, 2710.

In conformity with the aim of reducing the suffering of those unable to work regardless of the reason, the disability insurance program provides benefits on account of

3. This amount, however, cannot exceed one-half of the total wages paid to the individual during his base period. Calif. Unemp. Ins. Code § 2653.

nearly any incapacity. Those confined in an institution as a dipsomaniac, drug addict, or sexual psychopath are disqualified from receiving benefits while they are confined. *Id.* § 2678. The program compensates all others who are incapacitated with the *sole* exception that women, during a pregnancy and for 28 days after its termination, are denied benefits for any incapacity resulting from the pregnancy itself or any illness or injury caused by or arising in connection with the pregnancy. *Id.* § 2626. It is this special treatment that plaintiffs claim denies them the equal protection of the laws.

II.

Plaintiff Aiello, a self-supporting woman, was forced to cease working as a hairdresser on June 21, 1972, because of medical problems arising in connection with her pregnancy. The next day she was hospitalized, and after it was discovered that she was suffering from ectopic pregnancy, surgery was performed to terminate her pregnancy. Ms. Aiello's doctor ordered that she not return to work until July 28, 1972. On June 23 she applied for disability insurance benefits. These benefits were denied for the sole reason that her disability arose in connection with her pregnancy.

Plaintiff Armendariz is the sole source of support for herself, her husband, and an infant son. She was forced to cease working as a secretary on May 8, 1972, when she became ill and began bleeding. Early the next day she called an ambulance; on the way to the hospital she went into labor and suffered a miscarriage. Pursuant to the orders of her doctor, Ms. Armendariz did not return to work until the end of May. She applied for disability insurance benefits, and her application was denied solely because her disability arose in connection with pregnancy.

Plaintiff Johnson is the head of a household composed of herself and her five-year-old son. Their main source of support is the income she receives as an operator for the telephone company. Ms. Johnson entered the hospital on May 22, 1972, after experiencing intense abdominal pain, swelling in the legs, back pain, and general illness. Her condition was diagnosed as tubal pregnancy and, in order to save her life, an operation was performed to terminate the pregnancy. She was discharged from the hospital on May 30 and advised not to return to work until July 10. Her disability insurance claim was denied for the reason that her disability was disqualified by § 2626's pregnancy exclusion.

The last individual plaintiff, Ms. Jaramillo, was eight months pregnant when the initial petition for writ of mandate was filed. The court has been advised that she since had a normal delivery of her child. Except for her husband's educational expenses, her income is the sole source of support for herself, her husband, and their baby. Ms. Jaramillo wishes to receive benefits for the period during which she was physically incapacitated by the delivery of her child.

This case initially arose as two separate lawsuits. Ms. Aiello presented her claim in a federal court action, and the other plaintiffs initially presented their claims in a petition for a writ of mandate filed in the California Supreme Court. Defendant removed the state court action and it was subsequently consolidated with Ms. Aiello's suit. The plaintiffs who initially filed in state court moved that this court stay further proceedings pending the outcome of a state suit, but because neither the initial plaintiff nor the defendant saw any possibility that the statute could be construed so as to avoid the constitutional question, the motion was not granted. This court, therefore, must reach the federal constitutional claim presented.

III.

The threshold issue is what standard of review should be applied to test the validity of laws, such as § 2626, which discriminate on the basis of a sex-linked characteristic. In recent years the Supreme Court has employed two equal protection tests: If a statute is based upon a "suspect" classification, *e.g., Graham v. Richardson,* 403 U.S. 365, 372 (1971), or it concerns a "fundamental" interest, *e.g., Shapiro v. Thompson,* 394 U.S. 618, 627 (1969), it is subject to "strict scrutiny" and will be held invalid in the absence of a countervailing "compelling" state interest. In all other instances, a statutory classification is valid unless it is without "rational basis." *E.g., Dandridge v. Williams,* 397 U.S. 471, 485 (1970). *See generally Shapiro v. Thompson, supra* at 658-62 (Harlan, J., dissenting); *Developments in the Law: Equal Protection,* 82 Harv. L. Rev. 1065, 1076-1131 (1969) [hereinafter cited as *Developments*].

Although the Supreme Court has considered the question in two recent cases, *Frontiero v. Richardson,* CCH Sup. Ct. Bull. B2543 (May 14, 1973), and *Reed v. Reed,* 401 U.S. 71 (1971), it remains unclear how sex discrimination fits within equal protection doctrine. Although four members of the *Frontiero* Court were willing to hold that sex is a "suspect" classification, the majority refused to put sex in this category, at least until a case is presented that requires consideration of this extension of *Reed.* In view of the Supreme Court's intentional restraint, this court similarly does not consider whether sex discrimination is "suspect," because the challenged statute is invalid even under the *Reed* test. *See also Eisenstadt v. Baird,* 405 U.S. 438, 447 n.7 (1972).

Plaintiffs argue that, even under the test stated in the opinion in *Reed,* it is unclear how classifications based upon sex should be treated by the courts. Clearly the *Reed* Court

did not apply the "strict scrutiny" test. The Court, however, did hold invalid the statute challenged in *Reed*, whereas, until the last term, when the Court employed the "rational basis" test it almost always upheld the statute that was being scrutinized. *See generally* Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court*, 86 Harv. L. Rev. 1, 8 (1972); *Developments, supra* at 1087. Also, the opinion uses language quite different from language employed in some former "rational basis" opinions. *Compare Reed v. Reed, supra* at 75-76 *with, e.g., Dandridge v. Williams, supra* at 485. Finally, *Reed* rejects that idea that a challenged state statute can be justified on the basis of sexual stereotypes: Whereas the state supreme court found that avoiding hearings by having an automatic preference for men administrators is "neither . . . illogical nor arbitrary," because men generally have more experience in business matters, 93 Idaho 511, 514, 465 P.2d 635, 638 (1971), the Supreme Court deemed this "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause." 404 U.S. at 76. In this way, *Reed* greatly differs from some prior sex discrimination cases. *See Hoyt v. Florida*, 368 U.S. 57, 61-62 (1961); *Muller v. Oregon*, 208 U.S. 412, 421-22 (1908).

Because of these differences between *Reed* and prior "rational basis" test cases, it is not unreasonable to argue, as plaintiffs do, that *Reed* adopted an "intermediate test" for discrimination based upon sex. *See Eslinger v. Thomas*, ... F.2d ....., (5 E.P.D. ¶ 8530, at 7522) (4th Cir. Mar. 28, 1972); *Wark v. Robbins*, 458 F.2d 1295, 1297 n.4 (1st Cir. 1972) (dictum). It appears more likely, however, that *Reed* is not intended to establish a special equal protection test for sex discrimination. In *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972), the Court cites *Reed* as a case stating the test appli-

cable to "all equal protection cases." Similarly, in *Eisenstadt v. Baird, supra* at 446-47, the Court summarizes "[t]he basic principles governing application of the Equal Protection Clause" by quoting *Reed's* statement of the "rational basis" test.

These, and other, recent Supreme Court opinions show that *Reed* is probably only one of several cases that mark a general shift in the "rational basis" test to a standard "slightly, but perceptibly, more rigorous." *Green v. Waterford Bd. of Educ.*, ... F.2d ..... (sl. op. at 1729) (2d Cir. 1973); *see Gunther, supra* at 18-37. Under this test, courts must truly "scrutinize" challenged legislation and see whether the classifications made are "reasonable, not arbitrary, and . . . rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Reed v. Reed, supra* at 76; *see Eisenstadt v. Baird, supra at* 446-47.[4] The differences in application that have resulted from the use of this test are difficult to particularize. But, as Professor Gunther notes:

> Judicial deference to a broad range of conceivable legislative purposes and to imaginable facts that might justify classifications is strikingly diminished. Judicial tolerance of overinclusive and underinclusive classifica-

4. The suggestion in Judge William's opinion that *San Antonio Independent School Dist. v. Rodriguez*, 41 U.S.L.W. 4407, 4414 (S. Ct. Mar. 21, 1973), establishes a more tolerant standard than that quoted from *Reed* is incorrect. In *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 172 (1972), Mr. Justice Powell, the author of *Rodriguez*, states the "rational basis" test in words nearly identical to those used in *Rodriguez*. In that case the Court held invalid a state statute because fulfillment of an admittedly legitimate state purpose was "not *significantly* disturbed" by doing so. 406 U.S. at 175 (emphasis added); *see id.* at 183-84 (Rehnquist, J., dissenting). Thus, although Mr. Justice Powell states the "rational basis" test in different terms than those used by the Chief Justice in *Reed*, he, too, requires that a classification have a *substantial* rational relationship to a legitimate state purpose.

tions is notably reduced. Legislative leeway for unexplained pragmatic experimentation is substantially narrowed.

Gunther, supra at 20; *see Green v. Waterford Bd. of Educ., supra* at ..... (sl. op. at 1728-30). Also, as discussed above, the new test, as applied in *Reed,* requires rejection of statutory classifications based upon stereotypical generalizations rather than reason. *See Stanley v. Illinois,* 405 U.S. 645 (1972); *Heath v. Westerville Bd. of Educ.,* 345 F. Supp. 501, 506 (S.D. Ohio 1972); *cf.* 29 C.F.R. § 1604.1(a)(l)(ii).

This slightly altered "rational basis" test is the standard the court applies in this case. The court agrees with plaintiffs' conclusion that under this test the classification contained in § 2626 must be held to be unconstitutional.

IV.

Pregancy is clearly a unique human condition: only pregnancy can result in the birth of a child. For a woman, however, the effects of pregnancy and pregnancy-related illness are debilitating in much the same way as the physical and mental conditions that are included within the scope of the disability insurance program. The question whether the exclusion of pregnancy-related disabilities from the program is arbitrary or rational depends upon whether pregnancy and pregnancy-related illness substantially differ from the included disabilities in some manner relevant to the purposes of the disability insurance program.

The search for the purposes that actuated the legislature is a difficult one. The only purpose expressly stated for the enactment of the disability insurance program is "to compensate in part for the wage loss sustained by individuals

unemployed because of sickness or injury and to reduce to a minimum the suffering caused by unemployment resulting therefrom." Calif. Unemp. Ins. Code § 2601. Clearly the exclusion of pregnancy-related disabilities does not promote this purpose; the economic hardship pregnant women suffer when they cannot work is identical to the hardship of other disabled workers. Thus, the court must look to those unexpressed purposes that, according to the defendant, are promoted by excluding pregnancy-related disabilities from the program.

The principal argument the defendant has made in this court is substantially the same argument accepted in *Clark v. California Employment Stabilization Comm'n*, 166 Cal. App. 2d 326, 331-32 (1958)—that the exclusion of pregnancy-related disabilities is necessary to protect the solvency of the disability insurance program. As discussed, the program is financed entirely from employee contributions. To pay benefits for pregnancy-related disabilities, defendant argues, would be so costly that this mode of financing the program would be impracticable.

Clearly it is a legitimate interest for a state to attempt to preserve the fiscal integrity of its programs. *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969). More particularly, a state may properly seek to make a program self-sustaining and paid for by those who use it rather than by tax revenues drawn from the public at large. *United States v. Kras*, 41 U.S.L.W. 4117, 4122 (S. Ct. Jan. 10, 1973); *James v. Strange*, 407 U.S. 128, 141 (1972). "But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens." *Shapiro v. Thompson*, *supra* at 633; *see James v. Strange*, *supra* at 141-42; *Rinaldi v. Yeager*, 384 U.S. 305, 309-10 (1966). Thus, the fact that excluding pregnancy-related disabilities saves costs is only a first

step; the state also must show that the exclusion of pregnancy-related disabilities rests upon some ground of difference having a fair and substantial relation to the object of the legislation.

Defendant argues that pregnancy-related disabilities are unique in that coverage of these disabilities is so extraordinarily expensive that it would be impossible to maintain a program supported by employee contributions if these disabilities are included. Unfortunately, it is impossible to determine if the cost of including these disabilities is substantially greater than the cost of including other disabilities, because, according to defendant, no statistics are available indicating the cost to the program of paying benefits on account of various disabilities presently covered. Even using defendant's estimate of the cost of expanding the program to include pregnancy-related disabilities, however, it is clear that including these disabilities would not destroy the program. The increased costs could be accommodated quite easily by making reasonable changes in the contribution rate, the maximum benefits allowable, and the other variables affecting the solvency of the program. For example, the entire cost increase estimated by defendant could be met by requiring workers to contribute an additional amount of approximately .364 percent of their salary and increasing the maximum annual contribution to about $119.

Moreover, regardless of the effect the inclusion of pregnancy-related disabilities would have, these disabilities cannot be excluded merely because the cost of including the entire group might be prohibitive. While some women suffering pregnancy-related disabilities will have large claims, not all pregnant women will. As the court noted in *Heath v.*

Westerville Bd. of Educ., 345 F. Supp. 501, 505 (S.D. Ohio 1972), in its discussion of an analogous problem:

> Pregnancies, like law suits, are *sui generis*. While there are certain general similarities between each pregnancy, no two are entirely identical. While it may be quite true that some women are incapacitated by pregnancy and would be well advised to adopt regimens less strenuous than those borne by school teachers, to say that this is true of all women is to define that half of our population in stereotypical terms and to deal with them artificially. Sexual stereotypes are no less invidious than racial or religious ones. Any rule by an employer that seeks to deal with all pregnant employees in an identical fashion is dehumanizing to the individual women involved and is by its very nature arbitrary and discriminatory. [Citations and footnote omitted.]

Similarly, by excluding all pregnancy-related disabilities on the grounds that these claims will be large, the state denies pregnant women benefits on the basis of generalities and stereotypes contrary to the requirements of the equal protection clause.

Like the forced maternity leave in *Heath*, the denial of benefits for pregnancy-related disabilities seems to have its roots in the belief that all pregnant women are incapable of work for long periods of time, and therefore, they will submit large disability claims. The truth of this belief is certainly suspect. As the *Heath* court pointed out, the treatment of pregnancy in other cultures shows that much of our society's views concerning the debilitating effects of pregnancy are more a response to cultural sex-role conditioning than a response to medical fact and necessity. 345

F. Supp. at 505 n.1. Indeed, a realistic look at what women actually do even in our society belies the belief that they cannot generally work throughout pregnancy. *See Struck v. Secretary of Defense*, 460 F.2d 1377, 1379 (9th Cir. 1972) (Duniway, J., dissenting), *vacated and remanded to consider mootness*, 41 U.S.L.W. 3346 (S. Ct. Dec. 18, 1972). Nevertheless, the belief that pregnant women are disabled for substantial periods results in their being denied the opportunity to work, unemployment compensation benefits designed to aid those able to work, and—because of the belief that they will submit large claims—disability insurance benefits. *See generally* Walker, *Sex Discrimination in Government Benefits Programs*, 23 Hastings L. J. 277, 282-84, 285 (1971). Thus, the apparently solicitous attitude that pregnant women are in a "delicate condition" has the effect that they often cannot earn an income or obtain the usual social welfare benefits for the unemployed. The only way to assure that this irrational result is not simply the product of mistaken stereotypical beliefs is to require, as the equal protection clause does, that each pregnant woman be considered individually. *Cf. Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 19-20 (1971).

Therefore, if the state wishes to prevent or limit large claims, it must do so directly by excluding or limiting all claims in excess of certain amounts, not by excluding a disability that, in the opinion of the legislature, is likely to result in large claims. Then, to the same extent a heart attack victim or one suffering from sickle cell anemia is limited in the benefits he can receive, a woman disabled by pregnancy who makes a large claim will be limited.[5] Preg-

5. In such a nondiscriminatory system, if the contribution rate generated too much or too little income, increases or decreases in benefits would be spread across the entire work force. In the past, when excess income was generated the legislature increased the benefits to all workers except pregnant women.

nant women with smaller claims, however, would then be able to collect disability insurance benefits rather than be denied any relief on account of a stereotypical belief about women.[6]

The court, therefore, concludes that pregnancy-related disabilities cannot constitutionally be excluded solely because of the cost of adding these benefits. Defendant has failed to point to any rational ground of difference that would lead the court to conclude that it is not merely saving expense by arbitrarily denying benefits to a class of citizens. Thus, this case is like the hypothetical situation once suggested by the Supreme Court of a state reducing expenditures for education by barring indigent children from the schools. *See Shapiro v. Thompson, supra* at 633. Accordingly, the saving of cost cannot justify the classification.

Defendant also argues that other purposes actuated the legislature when it excluded pregnant women from the disability program. Although clearly the saving of costs was the main purpose, the court considers these other purposes, because they might be genuine secondary purposes. *See McGinnis v. Royster,* 41 U.S.L.W. 4259, 4263 (S. Ct. Feb. 21, 1973).

First, defendant suggests that one purpose of excluding pregnancy-related disabilities was to prevent women from receiving more than their share of benefits under the disability insurance program. This argument is based upon

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6. Although plaintiffs have argued that § 2626 is the result of stereotypical beliefs, others have suggested that pregnancy-related disabilities were excluded because women are a politically weak group, and reducing budgets by denying social welfare benefits to groups of women is, therefore, politically expedient. *Walker, supra* at 285. Precluding discrimination based upon political expediency is, of course, one of the traditional functions of the equal protection clause. *See Railroad Express Agency, Inc. v. New York,* 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

the fact that, at the present time, women contribute about 28 percent of the total disability insurance fund and receive back about 38 percent of the fund in benefits. Even if the state could constitutionally create a disability insurance program based upon actuarial data and tie the amount of benefits various groups would receive to the amount they contribute, the California disability insurance program is not such a program. Indeed, the program has a scale of benefits which is designed so that its likely effect will be that those earning small incomes will receive more in benefits than they contribute. *See* Calif. Unemp. Ins. Code § 2655. Thus, defendant must admit, and he candidly does admit, that it cannot be argued that in California's system "the right to benefits should have any relationship to the amount contributed to the fund." Defendant's Memorandum of Law at 12. In view of the absence of any consistent attempt to limit benefits of various groups based upon actuarial considerations, the state certainly cannot justify limiting benefits for pregnant women on this basis. To do so discriminates between these women and members of other groups who receive benefits greater than their contributions, and it, therefore, can be upheld only if some rational difference justifies the discrimination. No such difference exists, especially as between pregnant women and other women suffering sex-related disabilities.

Next, defendant argues that pregnancy-related disabilities were excluded to prevent abuse of the disability program. Pregnancy, defendant notes, is, to a large degree, voluntary, and he suggests that this would make it possible for a woman not interested in a career to abuse the disability insurance program by working a short period, be-

coming pregnant, and collecting a substantial award.[7] But pregnancy-related illness and injuries, such as those suffered by plaintiffs Aiello, Armendariz, and Johnson are not voluntary, and they, too, are excluded from coverage. Moreover, every other voluntary disability, including, for example, cosmetic plastic surgery, in included. Thus, it is difficult to believe that pregnancy-related disabilities were excluded to avoid abuse. If that was the legislature's purpose, the present scheme achieves it so irrationally that it cannot be upheld. *See Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 173 (1972); *Eisenstadt v. Baird*, 405 U.S. 438, 448-52 (1972).

Defendant's final argument is that pregnancy-related disabilities are excluded to avoid potentially difficult problems of determining when a woman is truly disabled by a pregnancy-related condition. There is some question whether a state may constitutionally discriminate against a class of persons merely to eliminate hearings on the merits of their claims. *See Stanley v. Illinois*, 405 U.S. 645, 656-57 (1972); *Reed v. Reed*, *supra* at 76. *But see Weber v. Aetna Cas. & Sur. Co.*, *supra* at 174-75. Even if this is a permissible objective, however, it is difficult to understand the rationality of achieving it by excluding only pregnancy-related disabilities until 28 days after the termination of pregnancy. First, a condition is no more easily shown to be disabling 28 days after the termination of pregnancy than prior to that time. Second, there is no reason to believe that the general requirements—that a claim be accompanied by a doctor's certificate and that a

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7. Defendant suggests the following hypothetical case: A woman who is not interested in pursuing a career could work one year, earn $8,500, contribute $85 to the disability insurance fund, become pregnant, and collect $2,730 *if* a doctor certified that she was disabled by her pregnancy for 26 weeks.

claimant submit to examination when defendant requires—will work any less well to assure the validity of pregnant women's claims than other claims. Certainly defendant cannot successfully argue that all pregnancy-related disabling conditions manifest themselves in less objective form than included disabilities. The conditions plaintiffs suffered, for example, resulted in dramatic, objective, medically verifiable disabilities. Finally, some conditions normally included as disabilities are excluded from coverage if they occur in connection with pregnancy. Clearly these conditions are no more objectively verifiable simply because the victim is not pregnant. Thus, it is unlikely that the state excluded pregnancy benefits to obviate problems of proof; if this was the purpose, there is not a sufficient rational relationship between the means and the end.

Having found that the exclusion of pregnancy-related disabilities is not based upon a classification having a rational and substantial relationship to a legitimate state purpose, the court must hold unconstitutional the provision of § 2626 excluding these benefits. Although this may require adjustments in the details of the disability insurance program, it does not interfere with the salutory purposes of the program. Nor does it thwart the state's legitimate interest in financing the program from the contributions of those receiving benefits. Fulfillment of these goals does not require that the disability insurance program embody an element of discrimination that denies pregnant women equal treatment.

In accordance with the foregoing, which constitutes the court's findings of fact and conclusions of law,

It Is Hereby Ordered and Adjudged that:

(1) plaintiffs' motion for summary judgment is granted and defendant's motion for summary judgment is denied;

(2) the third sentence of California Unemployment Insurance Code § 2626, which provides, "In no case shall the term 'disability' or 'disabled' include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter," deprives pregnant women of the equal protection of the laws contrary to the Fourteenth Amendment, and it therefore void;

(3) defendant, his successors in office, agents, and employees are enjoined from refusing to grant disability insurance benefits on account of the third sentence of California Unemployment Insurance Code § 2626;

(4) defendant shall forthwith reconsider the applications of plaintiffs Aiello, Armendariz, Johnson, and Jaramillo for disability insurance benefits and grant them such benefits as they are entitled to receive without regard for the third sentence of California Unemployment Insurance Code § 2626;

(5) the judgment that the court enters shall be a final judgment pursuant to Rule 54(b), Federal Rules of Civil Procedure, there being no just reason for delay in entry of final judgment for these plaintiffs; and

(6) plaintiffs are directed to prepare and submit a form of judgment in accordance with the foregoing and Local Rule 123.

Dated:

/s/ BEN. C. DUNIWAY
United States Circuit Judge

/s/ ALPHONSO J. ZIRPOLI
United States District Judge

United States District Judge

CAROLYN AIELLO etc., v. SIGURD HANSEN, etc.

NO. C-72-1402 SW

WILLIAMS, District Judge: I respectfully dissent.

I.

Plaintiffs herein, each denied disability insurance benefits by virtue of California Unemployment Insurance Code § 2626, claim that they are the victims of unreasonable discrimination based on their sex and are thus denied equal protection of the laws guaranteed by the Fourteenth Amendment. While conceding that there are some constitutionally permissible classifications on the basis of sex, they contend that no such valid basis exists here.

Defendant argues that this is not a discrimination against womankind, but only a permissible limitation of liability as to certain women during the transitory period of their pregnancy—plus 28 days; that viewed in its entirety the California Disability Insurance program is not discriminatory against women since they are faring much better than men under it;[1] that the limitation of liability provided by § 2626 is a reasonable insurance regulation based on valid economic objectives[2] derived from sound actuarial considerations; that it bears a rational relationship to the objectives of the legislation and that the granting of plaintiffs' motion would, in the name of equality, create an even greater program imbalance in favor of women over men.[3]

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1. Women contribute only 28% of withholdings but draw 38% of the benefit payments. Put another way, men receive $.89 per dollar contributed while women receive $1.37 per dollar contributed.

2. Defendant estimates that providing the claimed benefits to the estimated 210,000 who would be eligible would cost $120.2 million and require a 30% increase of revenue, either by increasing the rates or raising the ceiling of income subject to disability withholding.

3. Comparison of Male and Female Occupational Groups indicate that even without maternity benefits women have a higher annual claim rate, claim duration, and claim cost than men in every age group except 60-69.

II.

As in all Equal Protection matters the court must first determine the standard to be used in assessing the validity or invalidity of the State legislation under attack. If the legislation interferes with a right explicitly or implicitly guaranteed by the Constitution or involves a suspect classification, the state must carry the heavy burden of justification by showing a compelling state interest therefor. If such a fundamental right is not involved, and if the classification is not suspect, the state is entitled to the usual presumption of validity and the individual carrying the attack has the burden of showing that it fails to rationally further any legitimate state purpose. *Rodriguez v. San Antonio Independent School District* ..... U.S. ..... 41 Law Week 4407 (1973).

The majority states that while it is likely ". . . that *Reed* is not intended to establish a special equal protection test for sex discrimination", the case does represent a movement toward a new standard ". . . slightly, but perceptively, more rigorous." This leads us, the court concludes, to an equal protection analysis that rejects ". . . statutory classifications based upon stereotypical generalizations rather than reason." But I do not read pre-*Reed* cases as teaching anything less than this, and I believe that *Reed* teaches nothing more. The pivotal language of that opinion is a concise statement of the traditional test:

> "The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration *bears a rational relationship to a state objective that is sought to be advanced* by the operation of §§ 15-312 and 15-314." (emphasis added)

That such was and is the applicable standard is amply demonstrated in *Rodriguez supra* wherein Justice Powell, writing for a majority of the court, states:

> "A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review which requires only that the State's system be shown to bear *some rational relationship to legitimate state purpose.*" (emphasis added) 41 Law Week 4419.

Furthermore, in its most recent consideration of this question, a closely divided Supreme Court declined to hold that classifications based on sex are suspect.[4]

III.

Viewed separately, § 2626 seems to present an almost *per se* case of invidious discrimination. This appearance quickly dissolves, however, when in applying the rational relationship test, we view § 2626 in its context as an integral part of the Disability Benefits program.

The Disability Insurance Program is one segment of a three-part comprehensive insurance program to cover workers in California, the other two segments being Workmen's Compensation Insurance and Unemployment Insurance. The Workmen's Compensation Insurance Program was first enacted in California in 1913 and provided compensation for job-related illnesses or injuries regardless

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4. *Frontiero v. Richardson* ..... U.S. ..... No. 71-1694 (1973) 41 Law Week 4609. While the Court held 8-1 that the classification under attack violated the Equal Protection Clause of the 14th Amendment, only four (Justices Brennan, Douglas, White and Marshall) believed classifications based on sex to be 'suspect'. Three (Justices Powell, Blackmun, and the Chief Justice) specifically declined to take that step, Justice Stewart separately concurred that the statute worked an invidious discrimination and Justice Rehnquist dissented.

of fault. Then and now the law required all "employers" (as defined by statute) to secure payment of compensation for their employees by purchasing insurance from the State Fund, approved private insurance carriers or through self insurance (Labor Code § 3700). The entire costs are borne by the employer, it being a criminal offense to shift any of the cost thereof to the employee (Labor Code § 3751). The California Unemployment Insurance Program was adopted in 1935 and is also financed exclusively by employer contributions, no part of the cost of which is to be shifted to the employees.[5] Its purpose is to protect the purchasing power of persons becoming unemployed through no fault of their own, both for their own benefit and the benefit of the economy of the state.[6] The original act excluded payments for unemployment caused by illness or injury, and provided for a 1% *employee* contribution. By 1946, experience indicated that this 1% was not needed to finance the unemployment insurance program. Accordingly, Governor Earl Warren requested, and the legislature enacted, the Disability Insurance Program in which the 1% was used to cover those situations where unemployment was caused by *non*-job related illness or injury. "It is not possible," Warren said, "for employees to obtain from private insurance companies protection against loss of wages or salary during sickness as adequately or cheaply as the protection could be obtained by diverting their 1% contribution for the support of a Disability Benefits Program."[7]

Accordingly, there can be no serious question that these programs were conceived by the Legislature as *insurance*

5. California Unemployment Insurance Code § 976.
6. California Unemployment Insurance Code § 100.
7. California Senate Journal, June 23, 1946 pp. 228-229.

programs to be operated under insurance concepts.[8] Furthermore, there is little question that their objective was to protect against workers' loss of income by providing the broadest coverage and maximum benefits available within the limit of funds generated by a 1% contribution.

Governor Warren's message to the legislature requested that the premiums be set at 1%. The fact that this was done and has been continued at 1% over the years would indicate a continuing determination on the part of the legislature to operate the program within that level of contribution. Further indication of this intent is found in Cal.Unemp. Ins.Code § 2604 which authorizes the director of the program (with approval of the Governor) to forestall any emergency insolvency in the fund by altering the scale of benefits, or increasing waiting time for benefits. He is not authorized to increase the contribution rate, a power retained exclusively in legislative hands.

Additional evidence of the legislative's continuing determination to retain the 1% contribution level can be drawn from a review of the progress of Senate Bill 419 through the most recently concluded session of the state legislature. As introduced on March 1, 1972, S.B. 419 would have amended § 2626 to allow maternity benefits[9] for periods

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8. *Gillum v. Johnson*, 7 C.2d 744 (1936); *Calif. Comp. Ins. Co. v. Ind. Acc. Com.*, 128 C.A.2d 797 (1954); *Garcia v. Ind. Acc. Com.*, 41 C.2d 689 (1953); *Miller & Lux Inc. v. Ind. Acc. Com.*, 179 C. 764 (1919).

9. It is possible to construe § 2626 as *impliedly* excluding maternity benefits associated with a nomal pregnancy, since they arise neither from illness or injury, and *specifically* excluding benefits for illnesses or injuries arising in connection with complicated pregnancies until 28 days after the termination of the pregnancy. Plaintiffs reject this theory and contend that once a pregnancy compels a doctor to certify that the patient is unable to continue her employment benefits should accrue whether the pregnancy be normal *or* complicated.

beginning six (6) weeks before confinement and continuing nine (9) weeks thereafter, provided the claimant had been employed ten (10) months prior to the date of termination of the pregnancy. The bill was amended six (6) times before ultimate passage. The first amendment (June 5, 1972) allowed regular disability payments for specified abnormal conditions of pregnancy in addition to the originally proposed maternity benefits. The second amendment (June 20) increased employee contributions (up to a 73% increase) to cover the costs thereof, and the third (July 20) excluded maternity benefits and removed the proposed increased contributions. Coverage for specified abnormal conditions of pregnancy was retained. Thereafter it was once more amended (July 25) to provide additional revenue to cover the increased costs by increasing the level of income subject to the 1% contribution. After one final technical amendment (November 28) it was passed and presented to the Governor.

During all of its deliberations, the legislature had before it the cold, hard fiscal impact estimates which undoubtedly substantially affected its judgment in balancing employee contributions against benefits. For example, it was estimated that if S.B. 419 (as amended on June 5) became law, payments for basic disability benefits would increase $144.3[10]

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10. Defendant offers no explanation as to the variance between this figure and those offered for the purpose of this litigation (*supra* Note 3). The disparity however points up the difficulty of accurately estimating the fiscal impact of adding maternity benefits as well as the general economic magnitude thereof. Since this action affects only the Disability Insurance Benefits of the California Fund, and not similar public programs in other states, or similar private programs throughout the nation that could be subject to the same attack under Title VII of the Civil Rights Act of 1964, (as contended in the Amicus Curiae brief filed by the EEOC) the total financial consequences of the majority's opinion could be many times the initial $144 million involved here.

million (27.2%). The overall effect on the program would be to provide benefit payments equalling 142.4% of contributions. In its final form as passed by the legislature (and vetoed by the Governor) S.B. 419 covered only abnormal complications of pregnancy, excluded disabilities arising from therapeutic abortion, and provided necessary financing by increasing the ceiling on the amount of salary subject to the 1% contribution from $8,500 to $9,000.[11]

A review of the history of the legislative's treatment of *benefits* is also revealing. In each instance when the 1% contribution rate generated a surplus the legislature chose to spread it across the entire work force (including women in plaintiffs' claimed class) in the form of increased benefits rather than for financing the removal of the limitation on liability here under attack.[12] The sole amendment to § 2626 was one of form only and in essence reaffirmed the legislative policy of excluding liability for pregnancy related illness or injury for the period commencing with the incidence of the illness or injury and ending on the 28th day after the termination of the pregnancy.

Accepting as I do the legitimacy of these legislative objectives, it is difficult to imagine any statutory provision that could be more rationally related thereto, for without § 2626, the legislature would be compelled to either decrease expenditures by reducing overall benefit levels or increase contributions through higher rates or ceilings. Additionally

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11. Even if enacted into law S.B. 419 would, under plaintiffs' reasoning, have been constitutionally defective.

12. The Section establishing the payment levels (§ 2655) was amended at least once in each of the following years: 1955; '57, '59, '61, '63, '65, '68 and '71. Over that period the minimum monthly benefit was raised from $10 to $25 and the maximum from $35 to $105. Provisions for Additional Benefits to cover hospitalization costs were added in 1953 (§ 2801) and were liberalized both as to amount and duration in 1953, 1957 and 1970.

the program is far from arbitrary. It is under constant legislative surveillance[13], legislative action is preceded by thorough study and deliberation, and appears to be based on a careful balancing of the merits of increased benefits against the offsetting demerits of increased contributions[14].

The majority holds that the purpose of § 2626 is purely economic and that ". . . the saving of cost cannot justify the classification." Page 14, *supra*. I disagree. Even though § 2626 is essentially economic in nature its broader objective of enabling the legislature to construct a comprehensive program of benefits at minimal cost to the participants is certainly valid. And there is ample authority that classifications based on economic consideration can be valid.[15] Furthermore, if all legislative enactments that produce unequal financial impact on various classes are to be deemed suspect—a not illogical result of the majority's reasoning . . . the courts would be compelled to inject themselves into just the kind of controversy the Supreme Court sought to avoid in *Dandridge* when it stated, ". . . the constitution does not empower this Court to second-guess state officials with the difficult responsibility of allocating limited public welfare funds among the myraid of potential recipients." *Dandridge v. Williams*, 397 U.S. 471, 487 (1969).

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13. A review of its entire legislative history shows that the Disability Benefits program has been amended no less than 241 times since its enactment in 1946.

14. In upholding the validity of the Texas school financing scheme Justice Powell was careful to point out . . . "The Texas plan is not the result of hurried, ill-conceived legislation. It certainly is not the product of purposeful discrimination against any group or class. On the contrary, it is rooted in decades of experience in Texas and elsewhere, and in major part is the product of responsible studies by qualified people." 41 Law Week 4423.

15. *O'Gorman & Young v. Hartford Ins. Co.*, 282 U.S. 251 (1930) and *Borden's Co. v. Baldwin*, 293 U.S. 194 (1934).

The highest State Court to consider the validity of § 2626 reached this same conclusion. *Clark v. California Employment State Com.* 166 C.A.2d 326 (1958). There, the plaintiff claimed the section subjected her to an unreasonable classification and deprived her of equal protection of the laws. In upholding the constitutionality of § 2626 the court said.

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"A statute which excludes individuals of a specified class from benefits conferred thereby does not violate constitutional guarantees of due process of law, equal protection of the law, or uniform application of the law, providing the classification adopted is reasonably related to the purpose of the statute and is based on some natural, intrinsic or constitutional distinction which suggests a reason for and justifies the exclusion . . . Such a classification must not be arbitrary or unreasonable, but must be characterized by some substantial qualities or attributes which render the particular exclusion from benefits necessary or appropriate."

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"It is a matter of common knowledge that illness or injury arising from pregnancy is classified and excluded from the coverage provided by private contracts of health and accident insurance, in order to effect a premium rate lower than is required in the absence of such an exclusion. It is reasonable to assume that the inclusion of illness or injury caused by pregnancy within the coverage provided by the statute would increase substantially the demands upon the Fund and require a like increase in the contribution rate. As these conclusions are within reason, the inquiry into conditions establishing them is a matter for the Legislature, . . . It was properly within the sphere of legislative action to determine whether the objects of the statute in question would be served best by including a disability benefit which reasonably might impose upon the majority of employees a burden disproportionate to contemplated benefits, in order to favor the minority

who are included within the classified group. These reasons indicate that the class excluded was not arbitrarily selected, and that the purpose of the exclusion was germane to the legislative object." 166 C.A.2d at pp. 331-332.

A further rationale for § 2626, and one which the legislature is far better equipped to evaluate than is the court, is a legislative desire to avoid a potential calculated exploitation of the program. As pointed out by the defendant the voluntary aspect of pregnancy could lead to planned use of the program which was not contemplated in the creation of the program and not possible in most other disabilities. In order for a worker to collect maximum benefits of $105 per week for 26 weeks, it is only necessary to earn $8,500 per year and have 1% of that sum, or $85.00 per year withheld as a disability insurance contribution. If pregnancy were covered, a woman not ordinarily pursuing a career, could go to work for one year, and would then be eligible to collect $2,730 in pregnancy benefits if her doctor will certify that she is temporarily disabled from working the full 26-week period.

IV.

To the extent that § 2626 discriminates against women (it is exceedingly difficult to talk about equality of treatment between the sexes when pregnancy is involved), it does so reasonably. It is my opinion that the challenged statute is constitutionally valid and that by holding otherwise today the court is merely substituting its own judgment for that of the legislature.

/s/ SPENCER WILLIAMS
United States District Judge

Appendix B

United States District Court
for the Northern District of California

Filed Jun 19 1973
Clerk, U.S. Dist. Court

Carolyn Aiello, individually and on behalf of all others similarly situated, *Plaintiff,* vs. Sigurd Hansen, as Director of the State Department of Human Resources Development, *Defendant.*	No. C-72-1402 SW
Augustina D. Armendariz, Elizabeth B. Johnson, Jacqueline Jaramillo, et al., individually and on behalf of all other women similarly situated, *Petitioners,* vs. Sigurd Hansen, as Director of the State Department of Human Resources Development, *Respondent.*	No. C-72-1547 SW

This action came on for hearing on cross motions for summary judgment before a three-judge court, the Honorable Spencer Williams, District Judge, presiding. Certain issues having been duly heard and a decision on those issues having been duly rendered, and there being no just reason for delay of entry of final judgment and the court having expressly directed that judgment be entered,

It is Ordered and Adjudged, pursuant to Rule 54(b), that:

(1) Plaintiff's motion for summary judgment is granted and defendant's motion for summary judgment is denied;

(2) The third sentence of California Unemployment Insurance Code § 2626, which provides, "In no case shall the term 'disability' or 'disabled' include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter" deprives pregnant women of the equal protection of the laws contrary to the Fourteenth Amendment and is therefore void;

(3) Defendant, his successors in office, agents, and employees are enjoined from refusing to grant disability insurance benefits on account of the third sentence of the California Unemployment Insurance Code § 2626;

(4) Defendant shall forthwith reconsider the applications of plaintiffs Aiello, Armendariz, Johnson, and Jaramillo for disability insurance benefits and grant them such benefits as they are entitled to receive without regard for the third sentence of the California Unemployment Insurance Code § 2626; and,

(5) The judgment of the Court is final forthwith.

Dated at San Francisco, California, this fourth day of June, 1973.

/s/ BEN. C. DUNIWAY

/s/ ALPHONSO J. ZIRPOLI

Appendix C

United States District Court
for the Northern District of California

Filed—Aug—7 1973
Clerk, U. S. Dist. Court

Carolyn Aiello, etc., *Plaintiff,* vs. Sigurd Hansen, etc., *Defendant.*	No. C-72-1402 SW
Augustina D. Armendariz, et al., *Petitioners,* vs. Sigurd Hansen, etc., *Respondent.*	No. C-72-1547 SW

ORDER DENYING MOTION TO RECONSIDER

The motion of defendant Sigurd Hansen, Director of the State Department of Human Resources Development, to reconsider and set aside the judgment entered in the above numbered causes on June 15, 1973, is denied.

Dated: July 31, 1973

/s/ Ben. C. Duniway
United States Circuit Judge

United States District Judge

/s/ Alfonso J. Zirpoli
United States District Judge

Appendix D

In the United States District Court
for the Northern District of California

Filed—Aug—7 1973
Clerk, U. S. Dist. Court

Carolyn Aiello, etc., *Plaintiff,* vs. Sigurd Hansen, etc., *Defendant.*	No. C-72-1402 SW
Augustina D. Armendariz, et al., *Petitioners,* vs. Sigurd Hansen, etc., *Respondent.*	No. C-72-1547 SW

MEMORANDUM

I believe the motion for reconsideration should be granted. Regretfully, it is apparent that despite the considerable time and effort expended by both the parties and the court on this matter, the ultimate legal issue raised in these complaints has not yet been resolved. This lawsuit centers on the alleged unconstitutionality of Section 2626 of the California Unemployment Insurance Code, which reads:

> "Disability" or "disabled" includes both mental or physical illness and mental or physical injury. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work. In no case shall the term "disability" or "disabled" include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter.

The majority has ruled unconstitutional the last sentence of that section. We are now left with a shorter, but more ambiguous statute. The remaining language does not assist

the State in determining whether disability due to normal pregnancy is covered by the insurance plan. If the majority looks upon a normal, healthy pregnancy as a mental or physical illness or injury, then I believe it has gone a long way in establishing a more offensive stereotype than any previously feared by plaintiffs. If the majority has chosen instead to characterize pregnancy as a "physical or mental *condition*" (§ 2626, second sentence, emphasis added) having nothing to do with injury or illness, it does so only by ignoring the obvious coloring of the definition of "condition" lent by the "injury" and "illness" language of the first sentence. And if this is the court's holding, then it has bestowed upon women workers in California a *maternity* insurance program never contemplated by the California legislature or courts.

The distinction between healthy and complicated pregnancies as it relates to the constitutionality of § 2626 becomes even more crucial in light of the recent decision by the California Court of Appeal in *Rentzer v. California Unemployment Insurance Appeals Board*, Civ. No. 40694 (Second Division, May 24, 1973), where benefits for disability due to "ectopic pregnancy" were held not excludable under § 2626.[fn] Until this court comes to grips with this basic distinction, its decision will be the source of much confusion to the administering authorities, to the public and, as an appeal is likely, to the Supreme Court. For these reasons, I think we should re-hear the matter and issue a more definitive ruling.

Dated: August 3, 1973.

/s/ SPENCER WILLIAMS
United States District Judge

---

fn. As that section read prior to this court's May 31 ruling.

Appendix E

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Filed Jun 21, 1973

In the United States District Court
For The Northern District of California

CAROLYN AIELLO, individually and on behalf of all others similarly situated, *Plaintiff,* v. SIGURD HANSEN, as Director of the State Department of Human Resources Development, *Defendant.*	Civ. No. C-72-1402 SW
AUGUSTINA D. ARMENDARIZ, ELIZABETH B. JOHNSON, JACQUELINE JARAMILLO, et al., individually and on behalf of all other women similarly situated, *Petitioners,* v. SIGURD HANSEN, as Director of the State Department of Human Resources Development, *Respondent.*	Civ. No. C-72-1547 SW

MOTION TO RECONSIDER AND SET ASIDE SUMMARY JUDGMENT

Defendant, Sigurd Hansen, Director of the California Department of Human Resources Development, files this

motion for reconsideration of the judgment entered herein on June 15, 1973, holding void and enjoining further enforcement of a portion of section 2626 of the California Unemployment Insurance Code, on the following ground:

A change in the challenged statutory provision was brought about by the decision of the Court of Appeal for the Second Appellate District of the State of California on May 24, 1973 in the case of *Rentzer v. California Unemployment Insurance Appeals Board*, which interpreted the statutory exclusion very narrowly. The decision of the Court of Appeal was rendered shortly before this Court's decision was announced, so that there was no opportunity to call attention to it. The *Rentzer* decision, and the liberal administrative interpretation given it by the Department of Human Resources Development, have effected a significant change in section 2626. It is respectfully requested that this Court reconsider its judgment herein in light of the change in state law which has occurred.

WHEREFORE, defendant prays that the Court hear this motion and set aside its order granting summary judgment for plaintiff.

DATED: June 20, 1973

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ELIZABETH PALMER
Assistant Attorney General

/s/ JOANNE CONDAS
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Deputy Attorney General
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In the United States District Court
For The Northern District of California

CAROLYN AIELLO, individually and on behalf of all others similarly situated, *Plaintiff,* v. SIGURD HANSEN, as Director of the State Department of Human Resources Development, *Defendant.*	Civ. No. C-72-1402 SW
AUGUSTINA D. ARMENDARIZ, ELIZABETH B. JOHNSON, JACQUELINE JARAMILLO, et al., individually and on behalf of all other women similarly situated, *Petitioners,* v. SIGURD HANSEN, as Director of the State Department of Human Resources Development, *Respondent.*	Civ. No. C-72-1547 SW

AFFIDAVIT IN SUPPORT OF MOTION TO RECONSIDER AND SET ASIDE SUMMARY JUDGMENT

State of California
City and County of San Francisco—ss.

I, JOANNE CONDAS, being duly sworn, depose and say:

1. I am attorney for the defendant, and have been in

charge of this litigation since its inception and am personally familiar with the facts herein stated.

2. The case of *Gail E. Rentzer v. California Unemployment Insurance Appeals Board* was commenced, by petition for writ of mandate in the Superior Court of the State of California for the County of Los Angles, on January 19, 1972. The Superior Court denied the petition and Ms. Rentzer filed a notice of appeal to the Court of Appeal, Second Appellate District on March 29, 1972. The case was pending on appeal at the time of the commencement of both the *Aiello* and *Armendariz* actions. A decision in the *Rentzer* case was issued May 29, 1973. The case was not called to this Court's attention because the sole issue presented by the petitioner and appellant in *Rentzer* was whether an ectopic pregnancy was a pregnancy at all, within the contemplation of the statute. No challenge to the constitutionality of the exclusion of pregnancy was made.

3. The Court of Appeal, *sua sponte,* reexamined the precedent decision of *Clark v. California Emp. Stab. Com.,* 166 Cal.App.2d 326 (1958), pointed to its repeated use of the phrase "maternity benefits" and concluded that only "maternity benefits" were intended to be excluded. A copy of the decision in *Rentzer v. California Unemployment Insurance Appeals Board,* is attached hereto as Exhibit A.

4. In light of the rationale of the *Rentzer* decision, the Department of Human Resources Development has administratively determined that the statutory exclusion should be read to authorize compensation for injury or illness arising out of or in connection with pregnancy, and to exclude only "maternity benefits", that is, hospitalization and disability benefits for normal delivery and recouperation. A copy of a proposed letter to the eligibility workers of the Department of Human Resources Development is attached hereto as Exhibit B.

5. By virtue of the above-mentioned decision, and the interpretation given it by the agency administering the disability fund, this Court should have considered the much narrower question whether equal protection is denied to pregnant women who are eligible for disability compensation for illnesses and injuries arising out of or in connection with pregnancy but who are not granted maternity benefits.

Executed at San Francisco, California, June 20, 1973.

/s/ JOANNE CONDAS
JOANNE CONDAS
Deputy Attorney General

Subscribed and sworn to before me
this 20th day of June, 1973

/s/ CLAUDIA V. TARVER
Notary Public in and for said County
and State.

Appendix F

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In the United States District Court
For the Northern District of California

Filed—Aug 13 9 20 AM '73

Carolyn Aiello, individually and on behalf of all others similarly situated, *Plaintiff,* vs. Sigurd Hansen, as Director of the State Department of Human Resources Development, *Defendant.*	Civ. No. C-72-1402 SW
Augustina D. Armendariz, et al., individually and on behalf of all other women similarly situated, *Petitioner,* vs. Sigurd Hansen, as Director of the State Department of Human Resources Development, *Respondent.*	Civ. No. C-72-1547 SW

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

Notice is hereby given that Dwight Geduldig, successor to Sigurd Hansen as Director of the Department of Human

Resources Development of the State of California, defendant above named, hereby appeals to the United States Supreme Court from the final judgment of the three-judge district court filed herein on June 15, 1973, and from the order denying defendant's motion to reconsider filed herein on August 7, 1973.

This appeal is taken pursuant to 28 U.S.C. sections 1253 and 2101(b).

Dated: August 13, 1973.

Respectfully submitted,

Evelle J. Younger, Attorney General of the State of California
Elizabeth Palmer
Assistant Attorney General
/s/ Joanne Condas
Joanne Condas
Deputy Attorney General
Attorneys for Defendants

Appendix G

§ 984. ***Employee contributions; amount***

Each worker shall pay worker contributions, at the rate of 1 percent with respect to the wages paid to him by each employer for employment after his employer has satisfied the conditions set forth in this part with respect to becoming an employer. Contributions required under Sections 708 and 708.5 shall be at the rate of 1.25 percent of the remuneration deemed to have been received under said sections.

(Stats.1953, c. 308, p. 1485, § 984. Amended by Stats.1957, c. 2107, p. 3731, § 1; Stats.1961, c. 2153, p. 4445, § 9; Stats. 1961, c. 2154, p. 4450, § 4; Stats.1963, c. 1563, p. 3146, § 4; Stats. 1965, c. 745, p. 2153, § 1.3, eff. June 24, 1965; Stats. 1967, c. 1725, p. 4299, § 6)

§ 2601. ***Purpose; construction***

The purpose of this part is to compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury and to reduce to a minimum the suffering caused by unemployment resulting therefrom. This part shall be construed liberally in aid of its declared purpose to mitigate the evils and burdens which fall on the unemployed and disabled worker and his family.

(Stats.1953, c. 308, p. 1529, § 2601.)

§ 2604.5 ***Disability fund; cost study by director***

(a) The director shall study and determine:

(1) The annual cost to the Disability Fund of paying benefits under Sections 2610, 2611, 2653, 2655, 2710, and 2801 of the Unemployment Insurance Code under the amendments proposed in Senate Bill No. 633 of the 1968 Regular

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This appeal is taken pursuant to 28 U.S.C. sections 1253 and 2101(b).

Dated: August 13, 1973.

Respectfully submitted,

Evelle J. Younger, Attorney General of the State of California
Elizabeth Palmer
Assistant Attorney General
/s/ Joanne Condas
Joanne Condas
Deputy Attorney General
Attorneys for Defendants

Appendix G

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Session of the Legislature, as last amended, compared with the annual cost of paying benefits under Section 2655 in effect for periods of disability commencing on and after January 1, 1969 and prior to January 1, 1970.

(2) The cost to the Disability Fund of Senate Bill No. 633 of the 1968 Regular Session of the Legislature, as last amended.

(3) The annual cost to the Disability Fund of paying benefits under wage bases other than those proposed by Senate Bill No. 633 of the 1968 Regular Session of the Legislature, as last amended, compared with the annual cost of paying benefits under Section 2655.

(b) In making this study, the director shall use acceptable statistical and actuarial methods and shall use the most recent revenue and claims experience for which reliable data are available.

(c) The director shall report, not later than March 31, 1969, to the Governor and the Legislature the results of the study required by this section.

(Added by Stats.1968, 1st Ex.Sess. c. 5, p. 34, § 1.)

§ *2627. Eligibility for benefits*

A disabled individual is eligible to receive disability benefits equal to one-seventh of his weekly benefit amount for each full day during which he is unemployed due to a disability only if the director finds that:

(a) He has made a claim for disability benefits as required by authorized regulations.

(b) He has been unemployed and disabled for a waiting period of seven consecutive days during each disability benefit period with respect to which waiting period no benefits are payable; and

(c) Except as provided in Section 2709 he has submitted to such reasonable examinations as the director may require

for the purpose of determining his mental or physical disability.

(d) He has filed a certificate as required by the provisions of Section 2708 or 2709.

(Stats.1953, c. 308, p. 1532, § 2627. Amended by Stats.1953, c. 449, p. 1695; Stats.1953, c. 1371, p. 2946.)

§ 2801. *Amount of additional benefits during hospitalization; hospital defined*

During confinement in a hosptial, an individual eligible for benefits under this part is entitled to receive in addition to all benefits otherwise provided in this division and irrespective of his receipt of remuneration from his employer, the amount of twelve dollars ($12) for each day not in excess of 20 days in any one disability benefit period, during which he is so confined pursuant to orders of his physician or of a practitioner duly authorized by any bona fide church, sect, denomination or organization whose principles or teachings call for dependence for healing entirely upon prayer or spiritual means.

For the purposes of this part, "hospital" includes those institutions operated as hospitals but exempt from licensing by the State Department of Public Health under the provisions of subdivision (c) of Section 1415 of the Health and Safety Code.

(Stats.1953, c. 308, p. 1541, § 2801. Amended by Stats.1953, c. 1371, p. 2946; Stats.1957, c. 2107, p. 3735, § 7; Stats.1970, c. 1133, p. 2011, § 2.)

Appendix H

Certified for Publication

In the Court of Appeal of the State of California
Second Appellate District

Division Two

2d Civil No. 40694
(Sup. Ct. No. C 19074)

Gail E. Rentzer,
Petitioner and Appellant,
v.
California Unemployment Insurance Appeals Board Human Relations Agency,
Respondent.

Valley Presbyterian Hospital,
Real Party in Interest.

APPEAL from judgment of the Superior Court of Los Angeles County. John Cole, Judge. Reversed.

Messrs. Rentzer, Segall & Gilbert, Inc., by Robert D. Rentzer, for Appellant.

Evelle J. Younger, Attorney General, Elizabeth Palmer, Assistant Attorney General, Edward M. Belasco and Blanche C. Bersch, Deputy Attorneys General, for Respondent.

Mandamus. Gail Rentzer suffered an ectopic pregnancy[1]

1. Webster's Third New International Dictionary defines "ectopic pregnancy" as "gestation elsewhere than in the uterus."

when gestation occurred in one of her fallopian tubes, a part of the body in which a fetus cannot survive. The tube ruptured, surgery was required to save Rentzer's life, and as a consequence she was unable to work for six weeks. Rentzer appeals a judgment of the superior court refusing to order the California Unemployment Insurance Appeals Board to award her unemployment compensation disability benefits for the first 28 days of her six-week disability.

At issue is the interpretation of Unemployment Insurance Code section 2626, which provides in pertinent part:

> "In no case shall the term 'disability' or 'disabled' include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter."

The Board argues that Rentzer was ineligible for disability benefits for the first 28 days of her disability because her disability arose in connection with pregnancy. Rentzer argues that an "ectopic pregnancy" is really no pregnancy at all, that the Legislature did not intend the 28-day exclusion to apply to her condition.

The question is whether Rentzer's condition amounted to an illness "caused by or arising in connection with pregnancy," which therefore fell within the 28-day period of disability exclusion required under section 2626. While no California cases are directly in point, the scope of section 2626 was considered in *Clark v. California Emp. Stab. Com.*, 166 Cal.App.2d 326 (1958), where a woman disabled from employment because of pregnancy challenged section 2626 as a denial of equal protection of the laws. In upholding the reasonableness and validity of the statutory exclusion the court said that exclusion of pregnancy-con-

nected conditions amounted, in effect, to an exclusion of maternity benefits:

> "[T]o award disability compensation to women employees on account of illness caused by pregnancy, in effect, constituted a *maternity benefit plan* for a limited group, i.e., women employees. The purpose of the unemployment disability program is to afford relief to employees sustaining loss of wages on account of illness, and not to confer *maternity benefits*. To accomplish this purpose the Legislature was entitled legally to adopt such measures as might be necessary to exclude the indirect award of *maternity benefits* as an incident to the administration of its unemployment disability program. The consequent classification adopted has a substantial relation to the legitimate object thus sought to be accomplished." (166 Cal.App. 2d at 332; italics added.)

We agree with the court's conclusion that the legislative purpose in enacting the pregnancy exclusion of section 2626 was to spare the unemployment disability program the costs of a maternity benefit plan. (See Colquitt M. Walker, "Sex Discrimination in Government Benefit Programs," 23 Hastings Law Journal 277, 285 (1971).)

But Rentzer's disability was not an ordinary maternity disability involving preparation for and recuperation from normal gestation and delivery. Neither the fetus nor Rentzer could have survived the full term of gestation. Emergency surgery was performed not to deliver a viable child, but to stop internal bleeding, repair the ruptured fallopian tube, and halt a doomed, lifeless pregnancy. In *Jerger v. Commercial Ins. Co.* (Ohio 1965) 211 N.E.2d 99, plaintiff incurred medical expenses in connection with an ectopic pregnancy, and then sought reimbursement under a medical

insurance policy that excluded coverage "for pregnancy or any complications therefrom." Construing the policy liberally in favor of the insured, the court of common pleas ruled that an ectopic, or tubal, pregnancy ("a term about which the general public has little or no knowledge and which is entirely different from pregnancy") was not excluded by the terms of the policy. (See also, Annot., 97 A.L.R. 2d 1068.)

The Board points out that it has long interpreted the pregnancy limitation on disability as including ectopic pregnancy and the Legislature has not overruled that interpretation by amending section 2626. However, we do not look upon the prior administrative interpretation of the statute as conclusive and controlling, inasmuch as final responsibility for statutory interpretation lies with the courts and not with administrative bodies. "While administrative constructions are entitled to great weight when the language of a statute is ambiguous, final responsibility for the interpretation of the law rests with the court and an erroneous administrative construction does not govern the interpretation of the statute, even though the statute is subsequently reenacted without a change. [Citation.]" (*People v. Navarro*, 7 Cal.3d 248, 274.)

Unemployment Insurance Code section 2601 states that the purpose of California's disability compensation law "is to compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury and to reduce to a minimum the suffering caused by unemployment resulting therefrom. [The law] shall be construed liberally in aid of its declared purpose to mitigate the evils and burdens which fall on the unemployed and disabled worker and his family." Under this rule of liberal construction we conclude that an ectopic pregnancy is not a true

pregnancy within the meaning of section 2626 and that Rentzer is entitled to disability benefits for the full period of her disability.

The judgment is reversed, and the cause is remanded to the superior court with directions to issue the writ.

Certified for Publication.

FLEMING, J.

We concur:
ROTH, P.J.
COMPTON, J.

Appendix I

#1 SCHRD 6-18-73
TO: JOANNE CONDAS, DEPUTY ATTY GENL, SAN FRANCISCO

FROM: JOHN OBENAUER, COUNSEL, LEGAL SECTION DEPT OF HRD, SACRAMENTO

FIELD OFFICE DIRECTIVE [Letterhead]

Division of Job Training, Development, Placement, & Insurance Payments

Draft
No. 3- DI-
June 18, 1973

To: Field Office Managers

SUBJECT: Disability Insurance Payment Policy for Pregnancy-Related Disabilities

1. The California District Court of Appeal has ruled in the *Rentzer* case that DI benefits cannot be denied for abnormal conditions of pregnancy on the basis of the third sentence of Section 2626 of the UI Code.
2. As a result of this court action, Field Office Directive No. 3-177 DI-4 is modified in the following manner:
   a. If otherwise eligible, DI benefits shall be paid for abnormal pregnancy with involuntary complications of the conceptus. This includes but is not limited to hydatidiform mole; miscarriage that is spontaneous, missed, or incomplete; ectopic site; cesarean delivery; and eclamptic states.
   b. For days of disability which arise on or after June —, 1973, for all other pregnancy-related conditions not covered by paragraph a., above, the date in Item 3 of the 2501 shall be established in accordance with the third sentence of Section 2626 (Section 607 of the DOPM).

3. Until further notice, if an urgent problem arises concerning this modification of policy and procedures, phone Carl Peterson, UI-DI Section, ATSS 485-9101 or 445-9101. Any written requests for clarification shall be addressed to UI-DI Section, Attn: DI Group (MIC 29) with a copy to the Regional Administrator.
4. Retain this Field Office Directive until cancelled.

/s/ NIELS H. PEDERSEN, Deputy Director

IN THE

OCT 23 1973

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-640

DWIGHT GEDULDIG,

Appellant,

vs.

CAROLYN AIELLO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Appellees.

DWIGHT GEDULDIG,

Appellant,

vs.

AUGUSTINA D. ARMENDARIZ, ELIZABETH B. JOHNSON, JACQUELINE JARAMILLO, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHER WOMEN SIMILARLY SITUATED,

Appellees.

CONSOLIDATED CASES ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE JURISDICTIONAL STATEMENT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-640.

DWIGHT GEDULDIG,

Appellant,

vs.

CAROLYN AIELLO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Appellees.

DWIGHT GEDULDIG,

Appellant,

vs.

AUGUSTINA D. ARMENDARIZ, ELIZABETH B. JOHNSON, JACQUELINE JARAMILLO, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHER WOMEN SIMILARLY SITUATED,

Appellees.

CONSOLIDATED CASES ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE JURISDICTIONAL STATEMENT.

INTEREST OF THE AMICUS CURIAE.[1]

The Chamber of Commerce of the United States of America is a federation consistng of a membership of over thirty-seven hundred (3700) state and local cambers of commerce and professional and trade associations, a direct business membership in excess of thirty-eight thousand (38,000), and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

In order to represent it members' views on questions of importance to their vital interests and to render such assistance as it can to court's deliberations in such areas, the Chamber has frequently participated as *amicus curiae* in a wide range of significant labor relations matters before this Court. *E.g.*, *N. L. R. B.* v. *The Boeing Company, et al.*, 93 S. Ct. 1961 1973); *Griggs* v. *Duke Power Company*, 403 U. S. 365 (1971); *N. L. R. B.* v. *Granite State Joint Board*, 409 U. S. 213, 34 L. Ed. 2d 422 (1972); *Dewey* v. *Reynolds Metal Co.*, 402 U. S. 689 (1971); *Boy's Markets* v. *Retail Clerks Union*, 398 U. S. 235 (1970); *Alexander* v. *Gardner-Denver Co.*, S. Ct. Docket No. 72-5847, 466 F. 2d 2096 (CA 10, 1973); *H. K. Porter Co.* v. *N. L. R. B.*, 397 U. S. 99 (1970); *Sears Roebuck and Co.* v. *Carpet Layers, Local 419*, 397 U. S. 655 (1970) and *Super Tire Engineering Co. et al.* v. *McCorkle et al.*, S. Ct. Docket No. 72-1554, 469 F. 2d 911 (CA 3, 1972).

There are issues in this case that are of major importance to the Chamber's members: whether an employer may exclude maternity and related conditions from his disability program

1. Consents of all parties to the brief being filed have been secured.

without being guilty of illegal sex discrimination; what deference is due to the Equal Employment Opportunity Commission's new maternity guideline; and whether Title VII of the Civil Rights Act of 1964 requires employers to provide fringe benefits for female employees absent from work for reasons of pregnancy. These issues are matters of national concern because most employers have maternity leave policies and most employers come within the provisions of Title VII of the Civil Rights Act. Further, the collective bargaining agreements of a substantial number of these employers contain provisions concerning the payment of fringe benefits. The Chamber is, thus, vitally concerned that these questions be properly resolved.

The issues presented here are, as well, issues of first impression. Because of its broad representation of employers, the Chamber is in a position to present arguments to the Court which might not otherwise be advanced by the parties.

INTRODUCTION AND SUMMARY OF ARGUMENT.

This case presents the issue of whether a state statute may exclude maternity benefits from a state disability insurance program, which is intended to provide broad coverage at a minimal cost, without violating the Equal Protection Clause of the Fourteenth Amendment. This issue, however, can be viewed more broadly and when so considered this case has national and far reaching significance. Thus, while the constitutional question is significant, even more compelling are closely related questions concerning the Equal Opportunity Commission's new opinion guideline, effective April 5, 1972, on pregnancy and childbirth. This guideline states in part: "(b) . . . benefits . . . shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities." (Section 1604.10 (effective April 5, 1972))

Two issues of national importance are occasioned by this guideline:

1. Should this Court give any weight to the Commission's opinion or guideline on pregnancy and childbirth?

2. Should an employer be required to provide fringe benefits for pregnancy or maternity on the same terms as he provides these benefits for illness or injury?

It is apparent that the question of whether an employer covered by Title VII may exclude maternity and illnesses related to pregnancy from his insurance program will be a question that will frequently trouble every employer who provides insurance coverage for his employees, and, in addition, will puzzle lower courts unless this Court provides guidance.

While this Court has heard arguments in the related *La Fleur*

and *Cohen* cases,[2] there is a significant difference between those cases and the instant case. *LaFleur* and *Cohen* involved the narrow issue of whether school boards' policies requiring mandatory maternity leave in the fourth or fifth month of pregnancy violated the Equal Protecton Clause of the Fourteenth Amendment. That is, the issue was whether there was a rational basis for an employer to treat all pregnant employees alike without considering an individual's ability to work despite pregnancy. Here, this Court is asked to consider whether an employer may exclude a disability or illness from coverage under his employee benefit program without being guilty of sex discrimination simply because the excluded condition occurs only to one sex. To focus more closely on this question, it is apparent that an employer implementing his benefit insurance program may, if he chooses, exclude a condition, such as heart disease, which affects both men and women without violating any law. Does an employer, then, by excluding maternity and related conditions as covered risks under his benefit program thereby violate Title VII whether or not he presents sound reasons to justify the exclusions? The E. E. O. C. and the Appellee say yes. Reason dictates the contrary. This Court has not spoken.

The *amicus* believes that an employer should be able to formulate reasonable rules to promote the objectives of his insurance program. These objectives are to provide broad coverage and maximum benefits at a minimal expense. Based upon experience and information, an employer may believe that the inclusion of maternity and related conditions as covered risks will result in excessive demands upon his fund and therefore will require either an increase in premiums for all employees or a reduction in benefits to all employees. In those circumstances, the employer should be able to exclude maternity and related conditions as covered risks without being guilty of

2. Nos. 72-777 and 72-1129: oral argument on these cases was heard by this Court on October 15, 1973.

sex dscrimination. This exclusion is consistent with the legitimate objectives of the disability program. Yet the E. E. O. C. by brand new opinion guideline effective in 1972 says that the very exclusion of maternity benefits from disability programs, without more, violates Title VII and the Appellee here urges that such an exclusion *per se* violates Amendment Fourteen.

This Court has not passed upon the constitutional issue or the related issues concerning the E. E. O. C.'s guideline and *LaFleur* and *Cohen* do not reach these questions.

The *amicus* believes that this case provides an ideal vehicle for this Court to provide guidance to employers who come within the provisions of Title VII of the Civil Rights Act and either exclude maternity as a covered risk under insurance programs, or do not provide benefits for this condition on the same terms as they provide benefits for illness or injury. These issues presented here are of national scope and involve countless employers. These issues are significantly different than the issues presented in *Cohen* and *LaFleur*.

The *amicus* will first discuss the weight that should be given by courts to administrative guidelines, with particular emphasis on the weight that should be accorded to the E. E. O. C.'s 1972 guideline concerning pregnancy and childbirth. The *amicus* will then consider whether Title VII requires an employer to provide fringe benefits for maternity on the same terms as he provides these benefits for illness or injury. Finally, the *amicus* will discuss the constitutionality of the statute involved in this case.

ARGUMENT.

I.

THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S GUIDELINE RELATING TO PREGNANCY AND CHILDBIRTH IS ENTITLED TO NO WEIGHT BY THIS COURT.

It is the position of the *amicus* that the Commission's Sex Discrimination Guidelines are merely current opinions of the Commissioner as to the meaning of Title VII[3] and that, therefore, these guidelines do not have the force of law. Consequently, this Court has complete liberty to decide whether or not it will accord weight to the Commission's opinions, and if so, how much. In this proceeding, the *amicus* believes that this Court should give no weight whatever to the Commission's opinion that fringe benefits should be provided for pregnancy and maternity on the same terms as these benefits are provided for illness or injury.[4]

A. In General an Agency's Opinions Are Distinct from an Agency's Legislative Rules.

At the outset, however, it is well to distinguish between an agency's opinions or interpretative rulings on one hand and its legislative rules on the other. This distinction is background necessary to fully appreciate the *amicus*' position that the Commission's guidelines are but the Commissioner's *current opinions*.

A well reasoned judicial treatment of the distinction between agency opinions or what the court calls "interpretative rulings" and legislative regulations is found in *Gibbson Wine Co., Inc. v. Snyder*, 194 F. 2d 329 (CADC, 1951) at 333. The court stated:

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3. Title VII of the Civil Rights Act of 1964, Sections 701-16, 42 U. S. C. Sections 2000e to 2000e-15 (1964).

4. Section 1604.10 (effective April 5, 1972.)

"The distinctive characteristics of interpretative rulings, as contrasted with so-called regulations, have long been recognized. Administrative Officials frequently announce their views as to the meaning of statutes or regulations. Generally speaking, it seems to be established that 'regulations,' 'substantive rules' or 'legislative rules' are those which create law, usually implentary to an existing law; whereas interpretive rules are statements as to what the administrative officer thinks the statute or regulation means."

Professor Davis in his treatise on administrative law highlights this distinction:

"The distinction between interpretative rules and legislative rules is an essential part of our system, even though the Supreme Court has never provided a full-bodied discussion of it. A legislative rule is the product of an exercise of legislative power by an agency, pursuant to a grant (whether explicit or not) of legislative power by the legislative body; a court will no more substitute judgment of the content of a valid legislative rule than it will substitute judgment on the content of a valid statute. A legislative rule is valid if it is (a) within the granted power, (b) issued pursuant to proper procedure, and (c) reasonable.

"Interpretative rules are rules which do not rest upon a legislative grant of power (whether explicit or inexplicit) to the agency to make law. Interpretative rules usually interpret the statute, but sometimes they properly go beyond the statute, and when they do they are still called interpretative rules even though they are not interpretative in the literal sense."[5]

This distinction between an agency's opinions and its legislative rules is significant because as we will see "courts often substitute judgment as to the contents of an interpretative rule but almost always . . . refrain from substituting judgment as to the content of a legislative rule."[6]

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5. Davis, *Administrative Law Text*, Section 5.11 (1959).
6. *Id.* at Section 5.03.

B. An Agency's Opinions Have No Force or Effect of Law and Courts Have Liberty to Determine What Weight to Give to Them When Considering Statutory Issues.

This Court in *Zuber et al.* v. *Allen et al.*, 396 U. S. 168 (1969), discussed the weight given to administrative opinions and stated that while contemporaneous opinions are entitled to weight they are "only one input in the interpretational equation. . . . The Court may not, however, abdicate its ultimate responsibility to construe the language employed by Congress." (at 192-193)

The lower courts have fully agreed with *Zuber*. A particularly instructive case that discusses what judicial deference is given to administrative opinions is *O'Neil* v. *United States*, 281 F. Supp. 359 (ND Ohio ED 1968). In that case the court observed that all regulations are not entitled to equal weight before the courts.

> "A court has greater freedom when passing on an interpretative rule than a legislative one. In the case of an interpretative rule, the legislature has not delegated power to an agency to make a rule which is binding upon the courts. An interpretative regulation does not prevent a reviewing court from substituting its judgment on questions of desirability or wisdom. 'The law is embodied in the statute and the court is free to interpret the statute as it sees fit.' "

The Court in *American Newspaper Publishers Association* v. *Alexander*, 294 F. Supp. 1101, 1103 (DC DC 1968) bluntly stated that an interpretative rule is " . . . not a regulation having the force or effect of law."

We have now seen generally the distinction between administrative opinions and legislative rules and also that it is important for courts to make this distinction in order to define the extent of their powers to interpret statutes when confronted with administrative regulations. When confronted with agency opinions a court may substitute its judgment for the agency's

and reach a different conclusion than did the agency on the same facts.

C. The E. E. O. C.'s Sex Discrimination Guidelines Are an Agency's Opinions and Consequently Do Not Have Effect of Law.

It is apparent that the E. E. O. C. guidelines are not legislative rules as the courts and commentators have defined that term, but are merely expressions of current opinions by the administrative officers as to the meaning of the statute. Therefore, these guidelines do not have the force of a law binding upon a court, and a court is at liberty, when confronted with an issue relating to Title VII, to substitute its judgment on "questions of desirability and wisdom" and to reach a different result than did the Commissioner when he considered the same issue. The interpretive nature of the guidelines is seen from the guidelines themselves:

> "Because the material herein is interpretative in nature, the provisions of the Administrative Procedure Act (5 U. S. C. 553) requiring notice of proposed rule making, opportunity for public participation, and delay in effective date are inapplicable." 29 C. F. R. Part 1604 (1972).[7]

Courts have recognized that the E. E. O. C.'s guidelines are opinions and consistent with judicial decisions regarding administrative opinions generally have held *that these guidelines do not have "the force or effect of law." American Newspaper Publishers Association* v. *Alexander, supra* at 1103 (emphasis supplied).

Fully consistent with this opinion is the Sixth Circuit's decision in *Espinoza* v. *Farah Manufacturing Co.*, 72-671 (Argument heard Oct. 10 and 11, 1973) 462 F. 2d 1331 (CA 6, 1972) 4 FEP 931. The court in *Espinoza* refused to

7. These guidelines are based on 42 U. S. C. Section 2000e-12(b) (1970) which suggests that such opinions may be issued by the Commission.

defer to an E. E. O. C. guideline which equated discrimination on the basis of citizenship with the prohibited discrimination on the basis of national origin. After the court independently determined that the discrimination based on citizenship was not a "cover-up" for discrimination on the basis of national origin, the court refused to follow the E. E. O. C.'s opinion observing: "Thus to the extent such [citizenship] discrimination has been declared by the E. E. O. C. to be per se illegal, we refuse to follow its regulation. . . . While acknowledging deference is due, *blind adherence is not.*" (emphasis supplied) 462 F. 2d at 1335.

The E. E. O. C.'s guidelines, then, need not be followed blindly. They are but the Commission's current opinions as to the statute's meaning and courts are free to arrive at their own opinion and to accord no weight to the agency's. It is the court's responsibility to "construe the statutory language employed by Congress" and this responsibility cannot be abdicated to a Commissioner.

Indeed there is reason that this Court should not defer to any extent to the E. E. O. C.'s guidelines. On March 24, 1972 Congress invested the Commission with prosecutorial powers. Yet while giving these new prosecutorial powers to the Commission, Congress did not accord to the Commission the power to make substantive law.[8]

The Commission was rather required to prosecute its cases in a federal district court, and it is this court that is to interpret the Civil Rights Act and apply that law. There is no doubt that Congress can bestow upon an agency the power to make substantive law. The National Labor Relations Board is an example of an agency to which Congress has given the power to create a body of substantive labor law. Within the statutory framework of the National Labor Relations Act, the General

8. In Section 713(a) of Title VII (42 U. S. C. 2000e-12(a)), the word "procedural" was inserted by amendment on the floor of the House to make clear that the Commission did not have the power to make substantive regulations. 110 Cong. Rec. 2575 (1964).

Counsel and the Board itself have the power to create a substantial body of labor law and courts have justifiably deferred to the Board's expertise.[9] Because the Commission has not been given the power to create substantive law, its guidelines may now inform the public of what the prosecutor considers illegal, but there is no reason for a court to accord the prosecutor's views a special sanctity or to view them as a body of law having binding force. The Commission's opinions are just that—its view of what constitutes illegal conduct and a court should treat them as nothing else. When dealing with a Commission in its new prosecutorial function, the court has the ultimate responsibility to determine the law and it must not abdicate this responsibility to the prosecutor by deference to his guidelines.

D. The Agency's 1972 Opinion Declaring That an Employer Must Provide Benefits for Maternity or Pregnancy on the Same Terms As He Provides Benefits for Illness or Injury Is Entitled to No Weight by This Court Because It Is Inconsistent with Prior Opinions, Because It Was Not Issued When Title VII Was Enacted, and Because It Demonstrates None of the Thoughtfulness Commonly Associated with Agency Expertise.

While we have seen that E. E. O. C. guidelines do not have a force of law, and that a court need not defer to them when considering a Title VII issue, the crucial question here is what, if any, weight should this Court give to the Commission's opinion that "(b) . . . benefits . . . shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities."[10]

The amicus contends for reasons expressed in subpart C that this Court should give no weight to this guideline. There are

9. The Board's rules concerning what constitutes an effective contract bar to a representation election are one example.

10. Section 1604.10 (effective April 5, 1972).

in addition other important reasons why no weight should be accorded to this guideline.

Courts confronted with similar questions involving opinions of other agencies, have applied a variety of factors[11] in evaluating the weight to give to these opinions. Accordingly, guided by these factors, we shall examine the Commission's 1972 opinion.

The factors that are commonly recognized by courts when they evaluate the weight to give administrative opinions are:

First, was the opinion a contemporaneous construction of the statute it purports to interpret?

Second, has the opinion been applied consistently by the agency over a long period of time?

Third, was the opinion issued with evident thoughtfulness?

Fourth, has the agency demonstrated expertise in dealing with the subject discussed by the opinion?

When these factors separately or in confederation are applied to the Commission's 1972 opinion concerning pregnancy and maternity benefits, it will be clear that this opinion is entitled to no weight by courts when they decide Title VII issues.

1. Was the Commission's 1972 Opinion a Contemporaneous Construction of Title VII, and Has It Been Applied Consistently by the Commission for a Long Period of Time.

The short answer to both parts of this question is "no." However, a brief odyssey through the Commission's pronouncements on fringe benefits and pregnancy is necessary to fully appreciate the explicit inconsistency of the Commission's position.

Between 1966, shortly after Title VII became effective,[12] and 1969 the Commission issued a number of opinions, announcing

11. *Skidmore, et al.* v. *Swift and Co.*, 323 U. S. 134 (1944); *In Re: Petition of Chin Thloot Har Wong*, 224 F. Supp. 155 (D. C. SDNY. 1963) at 165; Davis, *Administrative Law Text*, Section 5.03 (1959).

12. Title VII of the Civil Rights Act of 1964 was enacted on July 2, 1964, with an effective date of July 2, 1965.

how it would apply Title VII when encountering the issue of fringe benefits and pregnancy. These opinions reveal a consistency of approach to this issue and generally informed employers that *they were not required to provide the same fringe benefits for pregnancy as they provided for illness or injury.*

For example, in an opinion letter, dated November 10, 1966, sixteen months after Title VII became law, the Commission's General Counsel stated:

> "In a recent opinion letter regarding pregnancy we have stated, 'The Commission policy in this area does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees.' Therefore, an insurance or other benefit plan may simply exclude maternity as a covered risk, and such an exclusion would not in our view be discriminatory."

Five days later, the General Counsel said:

> "Gentlemen:
>
> You state that under your collective bargaining agreement *male and female employees are granted sick leave with pay. Female employees, however, are granted maternity leaves without pay*; although their services are not terminated. You inquire whether this policy is in compliance with Title VII of the Civil Rights Act of 1964.
>
> *The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity,* since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees. Accordingly, we believe that to provide substantial equality of employment opportunity for both sexes, there must be special recognition for absence due to pregnancy, and for this reason have stated that, generally speaking, a leave of absence should be granted for pregnancy whether or not it is granted for illness. *On the other hand, we do not believe that an employer*

must provide the same fringe benefits for pregnancy as he provides for illness, and, consequently, it is our view that the policy you describe is not in violation of Title VII.

Sincerely yours,

CHARLES T. DUNCAN
General Counsel"

(November 15, 1966)
(emphasis supplied)

A month later, he said,

"You have requested our opinion whether the above exclusion of pregnancy and childbirth as a disability under the long-term salary continuation plan would be in violation of Title VII of the Civil Rights Act of 1964.

"In a recent opinion letter regarding pregnancy, we have stated, 'The Commission policy in this area does not seek to compare an employer's treatment of illness or injury with his treatment of maternity since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees.' Therefore, it is our opinion that according to the facts stated above, a company's group-insurance program which covers hospital and medical expenses for the delivery of employees' children, *but excludes from its long-term salary continuation program those disabilities which result from pregnancy and childbirth would not be in violation of Title VII.*" (December 9, 1966, as reported in CCH Employment Practices, 12-21-66, paragraph 17, 334.44) (emphasis supplied)

Within sixteen months after the enactment of Title VII, then, the Commission repeatedly advised employers that they need not "provide the same fringe benefits for pregnancy as [they provided] for illness . . ." and that the Commission did not require comparable treatment for illness and pregnancy.

The Commission still demonstrating consistency maintained this position through 1969. On June 19, 1969, a representative of the Commission announced that the Commission "views

pregnancy as a temporary disability, and has not to date equated it with sickness."

The Commission then ruled that an employer *may grant maternity leave without pay even though it provided pay for sick leaves.*[13]

The Commission's consistency came to an abrupt halt on April 5, 1972. Then, for the first time the Commission declared in an opinion guideline that pregnancy and illness were the same after all for the purposes of an employer's disability policy. The 1972 opinion, of course, has not been consistently applied for a long period of time because it is only the most recent Commission view on the subject and because it is totally and remarkably inconsistent with prior opinions issued over the last seven years. Moreover, it is these prior opinions, rather than 1972 opinion, that are contemporaneous constructions of Title VII. What weight then can be given to this 1972 opinion? Applying the criteria of consistent application and contemporaneous construction, the answer is, "none." Moreover, the answer does not change when the remaining relevant criteria are applied.

2. Was the 1972 Opinion Issued with the Evident Thoughtfulness That Marks Agency Expertise?

There is no evidence that the new 1972 opinion was formulated with consideration for alternatives or concern for ramifications. Moreover, when the Commission, after nearly seven years of consistantly applying the Act, abruptly changed its interpretation and consequent application of the Act, it must prove clearly and convincingly that its new interpretation is justified by a change in Congressional policy, or by new facts not previously in existence. Only if it meets this explicit proof burden is its new opinion entitled to any judicial consideration.

13. CCH, *New Developments, Paragraph* 8804 E. E. O. C Attorney Discusses Sex Discrimination and Fringe Benefits Under Title VII, 1964 Civil Rights Act.

The Commission has offered no such proof here. Indeed, its astonishing and erratic shift belies its obvious claim of expertise.

This much, then is now clear. In determining whether to defer or not and in evaluating the weight to give an agency's opinion as to the meaning of a statute, the courts commonly consider a variety of factors. When the Commission's 1972 opinion concerning fringe benefits and maternity or pregnancy is viewed in light of these factors, it is clear that this opinion is entitled to neither weight nor deference.

An additional reason why the pregnancy guideline is entitled to no weight is apparent when we consider that the pregnancy opinion was promulgated on April 5, 1972. Rather than urge its new views on pregnancy and childbirth before Congress when that body was considering its 1972 amendments to the Civil Rights Act, the Commission chose to lie in wait until those amendments were effective on March 24, 1972. Then dressed in new prosecutorial robes the Commission announced that for the first time it considered pregnancy and illness identical and employers would henceforth be required to treat them alike when applying personnel policies. The Commission apparently hoped to gain quick judicial approval under the authority of *Griggs* v. *Duke Power Company*, 401 U. S. 424 (1971). However, *Griggs is distinguishable*. For one thing when *Griggs* was decided the Commission did not have prosecutorial powers. For another, the statement by this Court in *Griggs* that agency guidelines were entitled to "great deference"[14] must not be overvalued, but rather should be confined to the facts of that case. As the court in *Espinoza* v. *Farah Manufacturing Co.*, *supra* observed:

> "In *Griggs*, the Court found that '(s)ince the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress.' 401 U. S. at 434. Moreover, in that case the Court made an independent analysis of the

14. at 433-434.

pertinent legislative history and decided that 'the conclusion is inescapable that the E. E. O. C.'s construction . . . comports with Congressional intent.' 401 U. S. at 436

Here, however, there is no evidence whatever that Congress intended an employer to provide fringe benefits for pregnancy on the same terms as he provides benefits for illness or to treat these distinct conditions in the same manner.

II.

AN EMPLOYER NEED NOT PROVIDE FRINGE BENEFITS FOR MATERNITY OR ILLNESSES RELATED TO PREGNANCY ON THE SAME TERMS AS HE PROVIDES THESE BENEFITS FOR ILLNESS OR INJURY.

We have seen that a court need not defer to the Commission's guidelines, including the Commission's 1972 opinion concerning pregnancy and childbirth. There are, moreover, compelling reasons that an employer should not be required to treat pregnancy and illness alike and should not be required to provide fringe benefits for maternity or pregnancy on the same terms as he provides these benefits for illness or injury.

A. Congress Did Not Intend to Require That Employers Provide Fringe Benefits for Pregnancy and Maternity in the Same Manner That These Benefits Are Provided for Illness or Injury.

In considering Congressional purpose or intent here, it is well to begin by examining the function of the E. E. O. C. and its approach to fringe benefits and maternity. The E. E. O. C. is the agency charged by Congress with the administration, interpretation and enforcement of Title VII of the 1964 Civil Rights Act. It can logically be presumed, therefore, that Congress was well informed as to the interpretations its Commission was applying to Title VII, particularly during early

stages of the Commission's existence. Because the Commission consistently and explicitly stated for the *first seven years* since the enactment of Title VII that employers were not required to provide the same fringe benefits for pregnancy as they provide for illness or to treat these distinct conditions in the same manner, Congressional awareness of this interpretation can be legally presumed.[15] Despite being aware that the Commission did not seek to compare an employer's treatment of pregnancy with his treatment of illness or injury, Congress did nothing to override the Commission's interpretation and its consequent application of that part of Title VII. Congress did not by statutory amendment, or otherwise seek to amend or to modify the Commission's interpretation.

Had Congress intended to require an employer to treat pregnancy and illness alike when devising or applying a personnel maternity policy, it had ample opportunity to manifest this intent in 1972 when it enacted a number of amendments to the Civil Rights Act of 1964. In a parallel situation involving religion, Congress required an employer to accommodate his work schedules and employment policies to the individual religious practices of his employees. This occurred when Congress reacted to the Fifth Circuit's decision in *Dewey* v. *Reynolds Metal Co.*[16] There, the court was faced with a Commission guideline that required an employer accommodate his business requirements to the religious beliefs of his individual employees or be held in violation of Title VII. Pursuant to this guideline, an employee, Dewey, charged that his employer discharged him for refusing, because of his religious beliefs, to arrange for a replacement to perform Sunday overtime work. The court held;

15. Congress has expressly provided that an employer's reliance on the Commission's interpretative opinions is a valid and complete defense in an E. E. O. C. proceeding. Erroneous interpretations if raised as valid defenses to E. E. O. C. proceedings could seriously frustrate the effective implementation of the Act. Thus, it is readily apparent that Congress intended to be kept informed of the Commission's interpretations. (42 U. S. C. 2000e-12b (1970).)

16. 402 U. S. 689 (1971), 429 F. 2d 324 (CA 6, 1970).

"The legislative history of the Act expresses a clear Congressional intent to inhibit only discrimination against an individual because of his race, color, religion, sex or national origin. . . .

Nowhere in the legislative history of the Act do we find any Congressional intent to coerce or compel one person to accede to or accommodate the religious beliefs of another. The requirement of accommodation to religious beliefs is contained only in the E. E. O. C. regulations which in our judgment are not consistent with the Act." at 334

In effect the court recognized that while the Act prohibited an employer from constructing his hiring, promotion or discharge policies so as to discriminate because of religion, the Act did not require an employer to adjust his personnel policies to accommodate the religious practices—such as the manner of Sabbath worship—of his individual employees. Congress recognized that the court's interpretation was accurate because it reacted by amending the Act in 1972 to require employers to adjust their work schedules and personnel policies to accommodate the various religious practices of their employees.

Because religion and sex are referred to in the 1964 Act in a like manner, it is reasonable to assume that Congress intended the Employer's obligations in the area of sex discrimination to be similar to those in the area of religious discrimination. By the 1964 Act Congress intended neither that an employer accommodate his personnel policies to individual religious practices nor that an employer pay maternity benefits in the same manner as he provides benefits for illness or injury. However through Congress in 1972 amended the 1964 Act to specifically enlarge an employer's responsibility in the area of religious discrimination, Congress did not enact an amendment requiring an employer to treat pregnancy and illness alike and to provide benefits for pregnancy on the same terms as he provides benefits for illness. This Congressional silence is even more revealing when the following facts are considered:

1. Congress had ample precedent had it desired to require an employer to treat pregnancy and illness in the same manner. In 1968, considering the Railroad Unemployment Insurance Act of 1946, Congress amended the definition of a day of sickness in that Act to include with respect "to a female employee, a calendar day on which because of pregnancy, miscarriage, or the birth of a child (i) she is unable to work or (ii) working would be injurious to her health.".

2. Congress had access to arbitrators' decisions which for two decades equated pregnancy and illness and required an employer to apply the same benefit policies to both.[17] Yet despite these decisions Congress chose not to require that employers treat pregnancy and illness alike in fringe benefit programs.

It is apparent, therefore, that had Congress desired to amend the Civil Rights Act in 1972 or at any time to require employers to treat pregnancy and illness in a similar manner when formulating or implementing benefit programs, Congress would have enacted such an amendment. It enacted an amendment in the area of religious discrimination, and the Railroad Unemployment Insurance Act specifically treats maternity as a form of illness. Congressional silence, then, must be taken to mean that Congress has no intention in 1972 to require an employer, when devising or implementing his employment policy, to equate pregnancy and illness and to treat them in the same manner with respect to fringe benefits, or related matters. This is all the more apparent when we recall that the Commission for seven years without Congressional censure had stated that pregnancy and illness were not indentical and had not required an employer to provide the same fringe benefits for pregnancy as he provides for illness.

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17. *Middleton Board of Education*, 56 LA 830 (1971); *National Lead Co.*, 18 LA 528 (1952); *Republic Steel Corp.*, 37 LA 367 (1961).

B. The Commission Consistently Recognized That an Employer Need Not Treat Pregnancy and Illness Alike When Providing Benefits, and the Court May Rely on These Precedental Guides When, As Here, the Commission Without Persuasive Reason Departs from Its Own Precedent.

After seven years of consistently saying that employers need not treat pregnancy and illness alike, the Commission, in a dramatic shift, equates pregnancy and illness for disability policy purposes. What evidence was offered by the Commission to justify its turn about? The Commission did not hold public hearings or invite public debate. It did not suggest that it suddenly devined a heretofore unnoticed Congressional intent. It did not claim to have discovered the law. It simply pronounced its guideline and will seek to win for it judicial approval so that its newest opinion can be raised to the level of judicial fiat.

The *amicus* believes that the Commission's departure from its own precedent can be justified, if at all, only if the Commission proves by pursuasive evidence that this radical shift was caused by very good reasons, *e.g.*, a newly announced Congressional purpose directly relating to the Commission's new theory or by facts that did not exist when the Commission pronounced its earlier opinions. Because the Commission at no time has demonstrated that such reasons exist, its departure from its own precedent should not be countenanced by this Court, particularly when the Commission's new opinion will cause substantial changes in employer-employee relations including major revisions in employer benefit programs.

Strong support for the *amicus'* position if found in the Fourth Circuit's opinion of *N. L. R. B.* v. *Quality Manufacturing Co.*[18] and the *amicus* offers that court's well reasoned opinion here as a guide.

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18. No. 72-1663, decided July 19, 1973 (83 LRRM 2817).

In *Quality*, the National Labor Relations Board purporting to interpret the Labor Act held for the first time in its history that an employer violated that Act by discharging an employee who insisted upon union representation at a meeting called by the employer to investigate the employee's conduct. The Court rejected the Board's holding because it "departed from existing case law[,]" and because,

> ". . . never has it been thought, as the Board would hold here, that [statutory] rights require an employer to permit an employee to have a union representative present whenever the employee 'has reasonable ground to fear that the interview will adversely affect his continued employment or even his working conditions.' "

The Court observed that the Board did not justify or support its "new theory" by a pursuasive analysis of the Labor Act or of legislative history, and concluded that the Board has no power to "alter or rearrange employer-employee relations to suit its very whim." The parallels between *Quality* and this case is clear. Both in *Quality* and in this case, an agency claiming to interpret its statute departed from its own precedent without advancing pursuasive reasons for doing so. In both *Quality* and in this case, the new agency opinion will have considerable impact on employer-employee relations. As did the court in *Quality* this Court should also reject an agency's departure from its own precedents when the agency advances no cogent reasons to justify its shift.

Rather than sanctioning and deferring to this abrupt departure from precedent, this Court, consistent with Congressional intent, should permit employers to treat maternity and sickness or injury differently when planning and implementing fringe benefit programs, be particularly when the employer advances cogent business reasons to justify this difference in treatment.

C. An Employer May Exclude Pregnancy, Maternity and Related Conditions from His Benefit Program Without Violating Title VII Even Though These Conditions Are Unique to the Female Sex.

Though pregnancy and maternity are unique to females, it does not follow that an employer violates Title VII when he excludes those conditions or related illness as covered risks under his disability program. The objective of an employer's disability plan is to provide the broadest coverage and maximum benefits for as little cost to the employer or employees as possible. An employer without violating any law should be able to formulate rules to promote this objective. Based on study or information an employer, may believe that the inclusion of a disease, such as heart disease, which happens to effect both sexes, will result in excessive demands upon his fund and therefore will require either an increase in premiums from all participants or a reduction in benefits to all participants. Under those circumstances, it is clear that the employer is able to simply exclude heart disease as a covered risk without violating any law. Similarly, based on study or information, an employer may believe that the inclusion of maternity or related conditions will result in excessive demands on his fund and require increased premiums or reduced benefits. Under these circumstances, an employer should be able to exclude maternity and related conditions as covered risks without being guilty of sex discrimination even though the excluded conditions affect only one sex. His decision to exclude maternity and related conditions is fully consistant with his desire to protect the fiscal integrity of his disability program and to provide maximum disability benefits at the lowest cost. The employer should not, therefore, be found to have violated Title VII.[19]

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19. The Supreme Court of the State of California stated in *Clark* v. *California Employment State Com.*, 166 C. A. 2d 326 (1958)

Similarly, if the cost of prostate operations increased, an employer would be able to exclude this operation as a covered risk, if in his judgment inclusion would defeat the goal of his benefit program, without being guilty of unlawful sex discrimination. It is overly simplistic to conclude that by excluding a condition occurring to only one sex from his disability program an employer *without more* unlawfully discriminates against that sex because such a conclusion overlooks the rational practical judgments that an employer must make if he is to maintain the objectives of his disability plan and automatically equates an employer's attempt to construct a comprehensive benefit program at a minimal cost to purposeful discrimination against a group or a class.

Griggs v. *Duke Power Co.*, 401 U. S. 424 (1971) is in accord with the position herein asserted. There, the employer required as a condition of employment that applicants have a high school education or that they pass a standardized general intelligence test. These requirements operated to disqualify Negroes at a substantially higher rate than white applicants. Because these requirements were not shown to be related to successful performance of the job for which the applicants were being considered, this Court held that the employer violated Title VII by maintaining these requirements, even though the employer did not intend to discriminate against Negroes. This Court stated that "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."

While *Griggs* involved discrimination between different races, in the area of maternity fringe benefits there is no such com-

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"It is a matter of common knowledge that illness or injury arising from pregnancy is classified and excluded from coverage provided by private contracts of health and accident insurance in order to effect a premium rate lower than is required in the absence of such exclusion." at pp. 331 and 332.

It is settled that exclusions or classifications based upon economic considerations can be valid. *O'Gorman and Young* v. *Hartford Insurance Co.*, 282 U. S. 251 (1930); *Borden's Co.* v. *Baldwin*, 293 U. S. 194 (1934).

parable competition between sexes and a regulation excluding maternity benefits does not, therefore, constitute illegal sex discrimination any more than the hiring of one Negro rather than another would constitute illegal racial discrimination.

In addition, while this Court in *Griggs* found that the requirements were unrelated to measuring job performance, and, therefore, discriminatory, this Court stated that nothing in the Act prevents an employer from using tests which relate to job performance and employers may require applicants to be fit for the job. Therefore, consistent with *Griggs*, if an employer excludes maternity benefits or the cost of any other type of benefit from his insurance program because he reasonably believes that the cost of these benefits would defeat the objectives of this program, these exclusions are related to the program's objectives and should not be proscribed by Title VII. Just as Title VII permits the use of tests related to job performance even though these tests could result in one race performing better than another, so too Title VII permits the exclusion of maternity benefits from insurance programs when this exclusion is necessary to maintain the program's objectives even though the exclusion treats pregnant women differently than all other persons. Moreover, the effect of the employment requirements in *Griggs* was to deny a large segment of the population of a North Carolina County employment opportunities. These requirements caused discrimination and had a pervasive effect against virtually the entire black population of that county because they did not have the educational background to meet the employer's requirements. Therefore, in *Griggs*, this Court employed a stringent test. Here, the exclusion, from benefit programs, of maternity benefits only affects a portion of one sex. Not only is there no discrimination between the sexes because of this exclusion but also the effect is not nearly so broad as the effect of the employer's requirements in *Griggs*. Whereas the requirements in *Griggs* excluded virtually all blacks all of the time, the exclusion here affects only some women some of the time. Indeed, pregnant women are treated exactly like men and women

with respect to sick leave and disability benefits. To accord them maternity benefits is in effect giving only those women who become pregnant extra benefits. For these reasons, the strict test utilized in *Griggs* should not apply here. Rather, if there is a ***reasonable basis*** to exclude maternity benefits from insurance programs, the exclusion should not violate Title VII. If a reasonable basis exists, a court should not substitute its judgment for the employer's. The E. E. O. C.'s guideline which proscribes the exclusion of maternity and pregnancy benefits regardless of the employer's reason for this exclusion is contrary to both this Court's decision in *Griggs* and to Congressional intent.

Indeed, Congress recognizes that employers should be allowed to formulate and implement employment policies including maternity benefit regulations without violating Title VII even though the employer by these regulations will treat pregnant women differently from non-pregnant women or men. This Congressional recognition is apparent because Congress has not directed that employers treat maternity and illness or injury in the same manner. Consistent with Congressional intent, this Court should *not* invade the province of Congress and strike down employer maternity regulations because they do not provide fringe benefits for maternity on the same terms as benefits are provided for illness or injury.

Like Congress, the Commission has stated consistently (until April, 1972) that an employer need not provide the same fringe benefits for Maternity as he provides for illness or injury and may exclude Maternity as a covered risk. For example, the Commission stated:

> "The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability *unique to the female sex* and more or less to be anticipated during the working life of most women employees. Therefore, *an insurance or other benefit plan may simply exclude maternity as covered risk, and*

such exclusion would not in our view be discriminatory." (Opinion letter of General Counsel, November 10, 1966) (Emphasis Supplied.)

Consistent with the Commission, well known leaders in women's rights movements, in testimony before Congressional sub-committees, have acknowledged that distinctions between benefits paid for maternity and benefits paid for illness do not constitute illegal sex discrimination.

> "*Mrs. Lee Berger Anderson,* President, Women's Bar Association of the District of Columbia: 'My thinking about the maternity benefit is that it is a benefit to the family. It is a benefit to the husband as well as to the children and the prospective mother or wife.' (Page 299)
>
> *Senator Bayh:* 'Primarily, it is the benefit of the children, is it not? You call it a maternity benefit, but it is primarily to help the children.'
>
> *Mrs. Anderson: 'Primarily, to benefit the children.'* (Emphasis added."[20]

Similar testimony occurred in an exchange between Senator Bayh and Mrs. Harmon and Aileen Hernandez:

> "*Senator Bayh:* 'Are you concerned at all about laws whose thrust, it seems to me, could not be changed inasmuch as some laws are aimed directly at the attributes of women as distinct from male, such as laws providing maternity benefits or those relating to criminal assault against women? Do you forsee such an impact on this type of law?'
>
> *Mrs. Myra Ruth Harmon,* President, National Federation of Business and Professional Womens Clubs, Inc.: 'It seems to me these are special aspects of our life and would require special laws. For instance the *maternity laws are provided to help the extension of the human race* and not for—because they are men or women. If a man would bear children he would be under the same law as a

20. Summary of hearings before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary, United States Senate, Ninety-First Congress, Second Session, on S. J. Res. 61 (May 5, 6, and 7, 1970), page 299.

woman is and these are entirely different types of laws, in my estimation, than the so-called "protective laws" regarding hours and types of working conditions." (page 37) (Emphasis added.)"[21]

"Aileen Hernandez, President National Organization For Women (Accompanied by Jean Witter, Chairman, Equal Rights Amendment Committee and Brenda Fasteau, Vice President for Legislation: (to Senator Bayh): 'I have heard the two questions you asked earlier, and if I might respond to those specific ones.

'You said maternity benefits, and the other one was criminal assault on a woman. It seems to me the maternity benefits are not a sex benefit. . . .' "[22]

Similar testimony occurred in hearings before subcommittee number four of the Committee on the Judiciary, House of Representatives, Ninety-Second Congress:

"*Mr. Sarbanes:* 'I am not clear on your attitude, whether you consider sex to be a reasonable basis for distinction under any circumstances. . . .'

Hon. Martha Griffiths: 'But you would have to have some distinctions in laws that apply to mothers, to pregnant women, because men aren't pregnant. You don't have to have the same law applying because of different functions of the body. The bodies are not exactly the same, so there could be a difference.' (page 51.)"[23]

Because pregnancy is unique to women, an employer's benefit policy which, for example, does not pay for pregnancy leave does not affect women in an area where they must compete with men such as, for example, plant seniority. Consequently, when an employer does not pay women for pregnancy leave he is not treating women *differently* than men as he would be if he denied *women* the right to accrue plant seniority while granting this right to *men*.

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21. *Id.*, page 37.

22. *Id.*, page 64.

23. First Session on H. J. Res. 35,208, and related bills, and H. R. 916 and related bills (March 24, 25, 31; April 1, 2 and 5, 1971, page 51).

Moreover, judicial opinions that have struck down discriminations based upon sex have been dealing with *outmoded stereotypes* based upon *supposed differences between the sexes* where those stereotypes produce distinct employment disadvantages for one sex.[24]

Consistent with the reasoning in these opinions, the real purpose of the sex discrimination law is to outlaw discrimination based upon outmoded sex stereotypes such as those mentioned in the administrative guidelines, including the characterizations that women are not capable of aggressive salesmanship or that men are less able to assemble intricate equipment.[25]

Unlike the so-called protective legislation that denied women jobs in favor of men, an employer's maternity regulation concerning benefits provided in the case of pregnancy does not operate in an area where men and women compete and does not create or perpetuate outmoded sex stereotypes. Accordingly, as this Court has recognized in cases arising under Title VII[26] and the Fourteenth Amendment,[27] there can be no sex discrimination when these regulations are implemented even if pursuant to these regulations the employer treats pregnant women differently than he treats all other employees.

In *Martin Marietta* this Court clearly held that Title VII barred sex discrimination only when one sex was treated differently than *the other.*

In *Martin Marietta* this Court said:

> "Section 703(a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Ap-

24. *E.g., Weeks* v. *Southern Bell Telephone and Telegraph Co.*, 408 F. 2d 228 (CA 5, 1969); *Diaz* v. *Pan American World Airways, Inc.*, 442 F. 2d 385 (CA 5, 1971); and *cf. Boyce* v. *Safeway Stores, Inc.*, 351 F. Supp. 402 (DC DC, 1972).

25. 29 C. F. R., Section 1604.2.

26. *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542 (1971).

27. *Reed* v. *Reed*, 404 U. S. 71 (1971); *Frontiero* v. *Richardson*, 93 S. Ct. 1764 (1973).

peals therefore erred in reading this section as permitting one hiring policy for *women* and another for *men—each* having pre-school age children." (emphasis supplied) at 544

This statement is wholly consistant with this Court's view that sex discrimination occurs only when an employer or a regulation discriminates between men and women in an area where the two sexes are in competition. That is, a violation of Title VII can occur only if there is discrimination based on women vis-a-vis men. In the area of pregnancy regulations there is no such competition.[28]

This Court has at least implicitly recognized that an employer may provide different fringe benefits for maternity than he provides for illness or injury or exclude maternity as a covered risk under his benefit program and yet not be guilty of illegal sex discrimination. In *Frontiero* v. *Richardson, supra,* while four judges of this Court reasoned that sex discrimination is to be severely censured, they did so only because sex like race is an immutable characteristic and like race generally bears no relation to ability to perform or contribute to society. On the other hand pregnancy unlike sex and race is not an immutable characteristic and frequently has a direct relationship to ability to perform or to contribute in a work situation.[29] Consequently,

28. In *Frontiero* v. *Richardson, supra* sex discrimination occurred because a statute commanded dissimilar treatment for *men* and *women* who were otherwise equally qualified for dependent benefit payments. In *Reed* v. *Reed, supra,* sex discrimination existed because a state statute gave perference to the *male* when both a *male* and a *female* otherwise equally entitled applied to administer a decedent's estate.

29. In *Schattman* v. *Texas Employment Commission,* 459 F. 2d 32 (CA 5, 1972) decided March 1, 1972, cert den. 93 S. Ct. 901 (1973) the court approvingly cited the testimony of Dr. M. D. McCauley, an Obstetrician and Gynecologist, who had practiced medicine for thirty-four years and who had presided at the delivery of over 10,000 babies. As reported by that court, Dr. McCauley said:

> "'We have some thirty-two susceptible young women there who are a constant problem in all phases of their work, starting in the last trimester of pregnancy.'

following the reasoning of *Frontiero*, while an employer may not impose rules which discriminate against females in favor of males, he may without violating Title VII treat maternity differently than other disabilities without being guilty of sex discrimination.

We have seen why this Court should accord no weight to the Commission's new pregnancy and childbirth opinion guideline which requires employers to pay the same fringe benefits for maternity as they provide for illness or injury. Rather this Court should recognize that an employer, without violating Title VII, may treat maternity differently than he treats illness or injury when applying his fringe benefit policy because:

1. Congress at no time has considered it to be unlawful sex discrimination if an employer provides different fringe benefits for maternity than he provides for illness, or instead altogether excludes maternity as a covered risk.

2. The Commission entrusted with interpreting Title VII has stated consistently (until its abrupt change in April, 1972) that an employer need not provide the same fringe benefits for maternity as he provides for illness or injury.

3. An employer in operating a benefit program may exclude a condition which if included will defeat the program's objectives, even though the excluded condition affects only one sex.

Dr. McCauley further testified that there is a change in the efficiency of a working woman after the sixth or seventh month of pregnancy; that, in his opinion, a regulation releasing women from their employment after the sixth or seventh month of pregnancy was reasonable; that in a woman after reaching the seventh month swelling of the limbs is very prevalent, especially in the summer; the ability to get around necessitates help and assistance from other employees; jobs they had been able to do themselves they now require help with, or they are unable to do them; they are frequently given to headaches, little irritable things; their personalities change quite a bit; and they are not only hard to live with but they are hard to employ. He further testified that women in that condition are frequently running to the bathroom or after a small bite of food or to loosen their garments because they are too tight."

4. Sex discrimination under Title VII can occur only when an employer or regulation discriminates between men and women in an area where the two sexes are in competition. That is, a violation of Title VII occurs only when there exists discrimination based on women vis-a-vis men. In the area of maternity fringe benefits there is no such competition.

The *amicus* now turns to the constitutional question raised by the exclusion of maternity benefits from the disability insurance program.

III.

THE STATE STATUTE EXCLUDING MATERNITY BENEFITS FROM A DISABILITY INSURANCE PROGRAM DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

A regulation is measured against the Fourteenth Amendment when it creates a classification of individuals and then treats the individuals in this classification differently than other persons are treated. However, as Justice Frankfurter observed, "classifications is inherent in legislation; the Equal Protection Clause has not forbidden it."[30] Consistent with these observations, this Court has stated that the Equal Protection Clause does not forbid all statutory classification or discrimination, but only that discrimination that can be called arbitrary or invidious[31]. These observations were amplified by the illuminating discussion of Chief Justice Burger in *Reed* v. *Reed, supra.* There, a state statute gave mandatory preference for the male when both a male and a female otherwise equally entitled applied for letters of administration of a decedent's estate. The Chief Justice observed:

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30. *Morey* v. *Doud,* 354 U. S. 457, 472 (1957).

31. "The Equal Protection Clause goes no further than the invidious discrimination." *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 489 (1955); *Morey* v. *Doud, supra; Lindsley* v. *National Carbonic Gas Co.,* 220 U. S. 61.

> "[T]his Court consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. (citations omitted) The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced are treated alike . . ." at 75-76.

The lower courts, too, have recognized that legislative and administrative enactments may treat different classes of persons in different ways without offending the Equal Protection Clause. In *Williams* v. *McNair*, 316 F. Supp. 134, 136 (DC DC, 1970) the Court stated:

> "The Equal Protection Clause of the Fourteenth Amendment does not require identity of treatment for all citizens, or preclude a state, by legislation, from making classifications and creating differences in the rights of different groups. It is only when the discriminatory treatment and varying standards, as created by the legislative or administrative classification are arbitrary and wanting in any rational justification that they offend the Equal Protection Clause." (Citations omitted.)

Because this Court has interpreted the Equal Protection Clause as proscribing only arbitrary and invidious statutory discrimination, this Court has developed tests to determine whether or not a regulation creates an arbitrary or invidious discrimination. These tests may be called the "rational basis" or "compelling state interest" tests and it is to a discussion of this Court's application of these tests that we now turn.

A. This Court Has Utilized the Rational Basis Test and the Compelling State Interest Test to Determine Whether Or Not the Equal Protection Clause Proscribes a Statutory Classification and Discrimination.

The rational basis test has been generally employed when this Court has looked to the Equal Protection Clause in considering the constitutionality of a state's regulation. Under this standard of review, a state legislature is presumed to have acted within its constitutional power and a "legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest."[32] The compelling state interest test, considered by this Court to be an exception to the usual standard of review expressed in the rational basis test, has been utilized by this Court only to review legislative enactments that abridged fundamental constitutional rights or that involved classifications that can be labeled as "suspect". This standard of review does not accord to legislative judgments the usual presumption of validity and requires that the state rather than the complainants justify discrimination found in the enactment by showing that a compelling state need is promoted by this discrimination.

1. The Rational Basis Test.

In applying this test, this Court has recognized that states must have a broad scope of discretion in enacting regulations even if these regulations treat different classes of individuals in different ways and has, therefore, deferred to the judgment of the legislators unless the discrimination created by the regulation has absolutely no rational relationship to a legitimate state purpose. This Court has summarized the rules for testing a discrimination under the rational basis test:

"1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in

32. *Frontiero* v. *Richardson, supra,* 1768 (1973).

> the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon a reasonable base, but is essentially arbitrary."[33]

Consistent with its pronouncement in *Lindsley*, this Court more recently has observed:

> "Indeed, it has long been the law under the 14th Amendment that 'a distinction in legislation is not arbitrary if any state of facts reasonably can be conceived that would sustain it . . . the rule of equality permits may practical inequalities' " (Citations omitted)[34]

Still more recently in discussing the rational basis test, this Court has stated:

> "the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their law results in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[35]

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33. *Lindsley* v. *National Carbonic Gas Co., supra*, at 78-79.
34. *Rapid Transit Corp.* v. *New York*, 303 U. S. 573 (1938).
35. *McGowan* v. *Maryland*, 366 U. S. 420, 425 (1960).

While under the reasonable basis test, a statutory discrimination will not be invalidated by the Equal Protection Clause if any facts can be conceived that would sustain it, it will not be necessary here, as will be seen below, to search long to discover that the classification in the state statute has a patently rational relationship to that regulation's legitimate purpose. Consequently, as will be argued below, the State regulation while excluding maternity benefits does not violate the Fourteenth Amendment.

This Court, then, by applying as a general rule the rational basis test to determine if a discrimination violates the Equal Protection Clause has recognized and acknowledged that it should not sit as a super legislature, but rather, should presume that the states acted within their constitutional powers even though the regulation creates some inequality by treating different classes of persons in different ways. Only in exceptional circumstances has this Court applied the other test—the compelling state interest test—to determine if a statutory classification and discrimination should be avoided by the Equal Protection Clause.

2. The Compelling State Interest Test.

This test has been applied only when a regulation creates a classification which may be judicially regarded as "suspect" or when the regulation may result in an abridgement of a constitutionally guaranteed (or fundamental) right.[36] We will consider each of these branches of the compelling interest test in turn.

(a) *The Suspect Classification.*

While it is difficult to formulate a concise definition of a "suspect classification" we learn from the cases that when a statute creates a classification that is based upon "an immutable

36. *San Antonio Independent School District* v. *Rodriguez*, 93 S. Ct. 1278 (1973).

characteristic determined solely by the accident of birth," and then imposes special disabilities upon members of that classification, the classification has been treated as suspect, subjected to strict judicial scrutiny, and allowed only if shown to be necessary to promote a compelling governmental interest.[37] This Court has held that race, alienage and national origin are inherently suspect because these characteristics frequently bear "no relation to ability to perform or contribute to society."[38] Thus, when a regulation focused on one racial group and treated this group differently than it treated members of other groups, the racial classification created by the regulation was regarded as constitutionally suspect and was subject to strict scrutiny by this Court.[39] Recently, where the sole basis of a classification created by a statute was the sex of the individuals involved, four Justices of this Court found the classification inherently suspect and subjected it to close scrutiny. *Frontiero* v. *Richardson, supra.* There, a federal statute commanded "dissimilar treatment for men and women who are . . . similarly situated [,]" by providing that a service woman may not claim her husband as a dependent in order to obtain increased benefits unless he is in fact dependent upon her for over one-half of his support, while a service man may claim his wife as a dependent without regard to whether or not she is dependent upon him for any part of her support. Whether or not a classification based on sex is "suspect," the *amicus* will demonstrate below that the exclusion of maternity benefits from an insurance program does *not* create a *sex* based classification.

This Court has not only employed the compelling state interest test to review statutes which create classifications which are suspect, but also has utilized this test when determining the

37. *Frontiero* v. *Richardson, supra* (1973); *Shapero* v. *Thompson,* 394 U. S. 618 (1969); *McLaughlin* v. *Florida,* 379 U. S. 184 (1964); *Graham* v. *Richardson,* 403 U. S. 365 (1971); *Korematsu* v. *United States,* 323 U. S. 214, 216 (1944).

38. *Frontiero* v. *Richardson, supra,* at 1770.

39. *McLaughlin* v. *Florida, supra.* There, the color of the skin determined whether there existed a criminal offense.

constitutionality of legislation which prevents the exercise of fundamental constitutional rights. We turn now to cases where this Court has considered whether rights asserted were, in fact, "fundamental" and whether the compelling interest or strict scrutiny test should be employed while reviewing legislative judgments that abridge those rights.

(b) *Fundamental Constitutional Rights.*

In *San Antonio Independent School District* v. *Rodriguez, supra*, this Court defined a fundamental right as a right that is "explicitly or implicitly guaranteed by the Constitution." In the earlier case of *Shapiro* v. *Thompson, supra*, Justice Stewart's observations are consistent with those of the Court in *Rodriguez*:

> "The Court today does *not* 'pick out particular human activities, characterize them as "fundamental," and give them added protection. . . .' To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands." 394 U. S., at 642. (Emphasis from original.)

In practice, this Court has found few rights to be fundamental and has sparingly employed this branch of the compelling interest test when reviewing the constitutionality of legislative enactments. The few rights that this Court has found to be fundamental because they are protected specifically by the Constitution include the right to participate in elections on an equal basis with other citizens in the jurisdiction,[40] the right to travel interstate,[41] the right of personal privacy,[42] and rights related to First Amendment interests.[43] However, this Court has found the following rights not to be fundamental constitu-

40. *Dunn* v. *Blumstein*, 407 U. S. 330 (1972).

41. *Shapiro* v. *Thompson, supra.*

42. *Skinner* v. *Oklahoma, ex rel. Williamson*, 316 U. S. 535 (1942).

43. *Police Department of the City of Chicago* v. *Mosley*, 408 U. S. 92 (1972).

tional rights because they are not explicitly or implicitly guaranteed by the Constitution, even though they have been recognized by this Court to be rights of considerable social significance: the right to welfare benefits;[44] the right to safe and sanitary housing;[45] the right to education;[46] and the right to pursue a particular occupation.[47] In *Dandridge*, this Court recognized that the "administration of public welfare assistance . . . involves the most basic economic needs of impoverished human beings[.]"[48] However, this recognition provided this Court no basis for departing from its traditional (rational basis) method of analysis of legislative classifications involving questions of economic and social policy because the right to welfare benefits while socially significant was not constitutionally guaranteed. Similarly, in *Lindsey* this Court recognized the importance of decent, safe and sanitary housing but stated:

> ". . . the Constitution does not provide judicial remedies for every social economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease, without the payment of rent. . . . Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions." at 74.

In *Rodriquez*, this Court stated:

> "Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education

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44. *Dandridge* v. *Williams*, 397 U. S. 471 (1970).

45. *Lindsey* v. *Normet*, 405 U. S. 56 (1972).

46. *San Antonio Independent School District* v. *Rodriguez*, *supra*.

47. *Williamson* v. *Lee Optical Co.*, *supra*; *Kotch* v. *Board of River Port Pilot Commissioners*, 330 U. S. 552 (1947).

48. *Dandridge* v. *Williams* at 485.

will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation." at 1297.

The lesson of the cases discussed in this sub-part is plain:

First, a suspect classification does not exist unless a regulation creates a classification that is based upon "an immutable characteristic determined solely by accident of birth," and then imposes special disabilities upon members of that classification.

Second, this Court will neither create substantive constitutional rights in order to guarantee them equal protection of the laws, nor subject state legislation to strict scrutiny because this legislation is of social significance. Rather, individual interests are characterized as fundamental and given added protection only if the right to pursue these activities is explicitly or implicitly guaranteed by the Constitution.

Third, unless a legislative enactment abridges fundamental constitutional rights or involves suspect classifications, this Court will employ the rational basis or traditional Equal Protection analysis in determining whether or not a legislative classification is constitutional. Under this test, "a legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest."[49]

Because the statute here neither creates a suspect classification nor prevents the exercise of a fundamental constitutional right, the Court should employ the rational basis or traditional test to evaluate the constitutionality of the classification created by the statute and find that the classification does not offend the Equal Protection Clause. To this argument we now turn.

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49. *Frontiero* v. *Richardson*, *supra* at 1768.

B. The Statute Excluding Maternity Benefits from the Disability Insurance Program Does Not Violate the Equal Protection Clause of the Fourteenth Amendment.

1. The Statute Neither Creates Nor Involves a Suspect Classification.

Whether or not sex is a suspect classification, the statute requiring that maternity benefits be excluded from the disability insurance program does not create a classification based upon sex. Discrimination based upon a sex classification can occur only when the two sexes are in actual or potential competition. *Reed* v. *Reed, supra; Frontiero* v. *Richardson, supra; Phillips* v. *Marietta, supra.*

There is no competition between men and women in the area of pregnancy or maternity regulations. This had been recognized by the E. E. O. C. for seven years, and has been recently recognized by leading exponents of women's rights:

> "[M]aternity laws are provided to help the extension of the human race and not for—because they are men or women." (Harmon, *supra.*)
>
> "It seems to me the maternity benefits are not a sex benefit." (Hernandez, *supra.*)
>
> "[Maternity benefits are] primarily, to benefit the children." (Anderson, *supra.*)

Further in *Frontiero* v. *Richardson, supra,* four Justices of this Court stated, "that classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny." At 1768. This Court went on to explain that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth . . . And what differentiates sex from such non-suspect statutes as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently

bears no relation to ability to perform or contribute to society." at 1770.

Sex, then, is considered to be a suspect classification because it is an immutable characteristic determined solely by the accident of birth and because it bears no relation to ability to perform or contribute to society. Unlike sex, pregnancy is not an immutable characteristic and it cannot be said that pregnancy bears no relation to ability to perform or to contribute to society. Consequently, following the reasoning in *Frontiero* it is clear that pregnancy cannot be a suspect classification even though sex, race, and national origin may be.

The basis of the holding in *Frontiero* is a further reason to distinguish that case from the instant case. In *Frontiero*, this Court added:

> ". . . any statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated,' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the [Constitution] . . .' We therefore conclude that, by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the Due Process clause of the Fifth Amendment in so far as they require a female member to prove the dependency of her husband." at 1772.

Under the rationale of *Frontiero*, then, a regulation that treats men and women differently, would violate the Fourteenth Amendment only if it were maintained for the sole purpose of achieving administrative convenience. In the instant case, not only is the classification created by the exclusion of maternity benefits not sex based or suspect, but as a further distinction between this case and *Frontiero*, the purpose of the exclusion is not administrative convenience. Rather, the main purpose for the exclusion is to preserve the solvency of the benefit pro-

gram as discussed by appellant in detail. Consequently, because administrative convenience is not the purpose of the statutory exclusion of maternity benefits, following *Frontiero* the statute does not violate the Equal Protection Clause.

Because the Statute does not create a suspect classification, the compelling interest test can be utilized to review the constitutionality of the statute which excludes maternity benefits from disability insurance programs only if that exclusion abridges a fundamental constitutional right.

2. The Exclusion of Maternity Benefits Does Not Abridge Fundamental Constitutional Rights.

This Court in rejecting the opportunity to create "substantive constitutional rights in the name of guaranteeing equal protection of the laws [,]" has stated that the key to discovering whether a right is "fundamental" lies not in its social significance but rather in determining whether the right is explicitly or implicitly guaranteed by the Constitution.[50]

It is difficult to imagine what fundamental right is abridged by the State's regulation excluding maternity benefits from its disability insurance program. If the right to bear children is a fundamental right it is in no way abridged by the State's regulation. Women bear children every moment without any hope of receiving maternity benefits from any source. Nor is there any interference with the right to employment if that right is considered to be fundamental.[51]

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50. *San Antonio Independent School District* v. *Rodriguez*, *supra*, at 1297.

51. In *Dandridge* v. *Williams*, *supra*, this Court recognized that the usual rational basis standard was to be employed when evaluating the constitutionality of state legislation that restricted the availability of employment opportunities. This recognition indicates that the right to employment opportunities is not a fundamental constitutional right requiring added protection by the application of the compelling interest test. *Dandridge* cited with approval *Goesaert* v. *Clarie*, 335 U. S. 464 (1948) and *Kotch* v. *Board of River Port Pilot Commissioners*, 330 U. S. 552 (1947).

Because there is no fundamental constitutional right involved in this case, any argument that the State's statute is over-broad and therefore unconstitutional because it denies maternity benefits to all pregnant women regardless of the size of the disability claims has no place in this case. As this court observed in *Dandridge* v. *Williams, supra.*

> "If this were a case involving government action claimed to violate the First Amendment guarantee of free speech, a finding of 'overreaching' would be significant and might be crucial. For when otherwise valid governmental regulation sweeps so broadly as to impinge upon activity protected by the First Amendment, its very overbreadth may make it unconstitutional. See, *e.g., Shelton* v. *Tucker,* 364 U. S. 479. But the concept of 'overreaching' has no place in this case. For here we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants of welfare payments to the largest AFDC families. For this Court to approve the invalidation of state economic or social regulation as 'overreaching' would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought.' *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 488. That era long ago passed in to history. *Ferguson* v. *Skrupa,* 372 U. S. 726.

In *Goesaert,* this Court upheld a state statute prohibiting women other than wives and daughters of bar owners from becoming bar maids.

Consistent with the opinions of this Court is the Sixth Circuit's opinion in *Orr* v. *Trinter,* 444 F. 2d 128 (1971) cert. denied 408 U. S. 943 (1972), rehearing denied .... U. S. ..... In *Orr,* a public school teacher alleged that his constitutional rights were violated because the School Board without reason refused to renew his teaching contract. He asserted that the Fourteenth Amendment prevented the State from depriving him of life, liberty and property without due process. While this was a case arising under the Due Process Clause, the court nonetheless in a statement relative to these proceedings held that there is "no constitutionally protected right to government employment." at 133, 134.

"In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley* v. *National Carbonic Gas Co.*, 220 U. S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' *Metropolis Theatre Co.* v. *City of Chicago*, 228 U. S. 61, 69-70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan* v. *Maryland*, 366 U. S. 420, 426."

We have seen that the statute denying maternity benefits under the State insurance program does not operate to the disadvantage of a suspect class or abridge fundamental constitutional rights. Therefore, strict judicial scrutiny is not required. Nonetheless, the statute must be examined to determine if it rationally further a legitimate state purpose and, therefore, does not constitute invidious discrimination in violation of the Equal Protection Clause. To this examination we now turn.

3. The Statute Denying Maternity Benefits Under the State Insurance Program Does Not Violate the Equal Protection Clause When the Traditional or Reasonable Basis Standard of Review Is Employed to Evaluate Its Constitutionality.

As this Court stated, "Under 'traditional' equal protection analysis, a legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest." *Frontiero* v. *Richardson*, *supra*, at 1768. The rational basis test then employs three standards: first, a legitimate governmental purpose must be found to exist; second, the classification created by the statute must be rationally related to and further this legitimate governmental interest; third, all persons within the class must be treated alike.[52]

52. *United States Department of Agriculture* v. *Moreno*, 93 S. Ct. 2821 (1973); *F. S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412 (1920); *Frontiero* v. *Richardson*, *supra*.

The disability insurance program has an objective to provide the broadest coverage and maximum benefits at the least cost to employees. Maternity benefits are excluded because the State believes, based upon study and deliberation that this exclusion is necessary if the program is to remain solvant and meet its objectives. This has been set forth in detail by the appellant. Both the desire to keep the program solvant and the broader objective to provide disability benefits are valid State objectives. Exclusion of maternity benefits is necessary in the State's reasonable judgment to achieve those objectives. Consequently, it is clear that the State's regulation meets the standards of the traditional or reasonable basis test and the classification created by the regulation does not violate the Equal Protection Clause even though the regulation results in different classes of persons being treated in different ways.

While California excludes maternity benefits from its disability insurance program and while other states such as New Jersey and Rhode Island limit maternity payments to a fixed period[53] this difference merely reflects the individual judgment of the state legislatures. Such legislative discretion has been respected by this Court.

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results, in some inequality.' *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' *Metropolis Theatre Co.* v. *City of Chicago*, 228 U. S. 61, 69-70."

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53. Summary of State Labor Laws, U. S. Department of Labor, March, 1969.

Whether a state should require a fixed period for maternity benefits or completely exclude maternity benefits from a disability insurance program depends upon many variables such as population that are best known to the legislature of each state. An application of the reasonable basis test by this Court when it determines the constitutionality of a statute such as involved in this case will allow a state legislature to continue to exercise this discretion in a manner calculated to maintain the fiscal integrity if its a benefit program and to achieve maximum benefit for all its citizens. However, application of the stricter standard of review may well foreclose any legislative discretion and by requiring the state to pay maternity benefits in the same manner as it compensates for illness or injury drastically curtail disability insurance programs. Indeed, as the Appellants in their brief, and as the dissenting opinion of Williams, District Judge, in the court below set forth in detail, California's disability insurance program would be in jeopardy of insolvency if the State could not exclude maternity benefits from this disability insurance program. In order that a state may continue to provide the broadest insurance coverage and maximum benefits within the limits of a reasonable employee contribution, this Court should apply the rational basis test when it evaluates the constitutionality of statutes such as the statute in the instant case. When this test is applied, the constitutionality of the statute in this case is assured.

CONCLUSION.

The questions presented by this appeal are substantial and have broad public importance. Probable jurisdiction should therefore be noted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-640

DWIGHT GEDULDIG,

Appellant,

v.

CAROLYN AIELLO,
Individually and on Behalf of
All Others Similarly Situated,

Appellees,

DWIGHT GEDULDIG,

Appellant,

v.

AUGUSTINA D. ARMENDARIZ, ET AL.,
Individually and on Behalf of All
Other Women Similarly Situated,

Appellees.

Consolidated Cases on Appeal from the United States District Court for the Northern District of California

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BRIEF FOR GENERAL ELECTRIC COMPANY, AS AMICUS CURIAE, IN SUPPORT OF THE JURISDICTIONAL STATEMENT

This brief *amicus curiae* in support of the Jurisdictional Statement herein is filed by General Electric Company with the consent of all parties,[1] as provided for in Rule 42 of the Rules of this Court.

INTEREST OF GENERAL ELECTRIC COMPANY

General Electric Company (hereinafter "GE") is engaged in the manufacture of industrial electrical equipment, products for national defense, consumer electrical appliances, electronic equipment, medical equipment, jet engines, and in addition, an almost endless array of electrical items and machinery. GE has over 250 manufacturing plants located in some 33 states and territories of the United States. It is one of the largest employers in the United States, employing more than 310,000 persons.

GE employees, of whom approximately 85,000 are females, are covered by non-occupational sickness and accident insurance which provides them with weekly income maintenance benefits for total disability resulting from non-occupational sickness or accidents. Benefit payments under such insurance are not payable, however, for any absence from work due to pregnancy or childbirth or to complications in connection therewith.

GE is the defendant in a civil suit presently pending in the United States District Court for the Eastern District of Virginia, Richmond Division (*Gilbert, et al., Plaintiffs*, v. *General Electric Company, Defendant*, No. 142-72-R), in which issues have been

[1] Letters consenting to the filing of this brief have been filed with the Clerk of the Court.

raised analogous to those in the case before the Court. The amended complaint in the suit, which the District Court has allowed to proceed as a class action on behalf of GE female employees, alleges in substance that GE, in violation of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e, *et seq.*), has discriminated, and is discriminating, against its female employees because of their sex by maintaining in effect the above-described sickness and accident insurance with the indicated pregnancy exclusion, and by denying benefits thereunder to female employees for absences from work resulting from pregnancy or childbirth. Plaintiffs in the suit are seeking, *inter alia*, an injunction requiring the elimination of the pregnancy exclusion from GE's sickness and accident insurance coverage, and monetary damages. It is anticipated that the District Court will render a decision in the suit before the end of the year, trial having been held in July 1973.

GE has a very real and direct interest in this case because it presents fundamental issues pertaining to alleged discrimination on the basis of sex which are similar to issues that have been raised in the *Gilbert* case against GE now pending in the District Court. In GE's view this case was decided erroneously by the court below. Thus, as the outcome of this case may affect the ultimate outcome of *Gilbert*, GE has a substantial interest in the Court's correction and reversal of the decision below.

ARGUMENT

A. The Case Before the Court is Likely to Affect the Disposition of Issues Relating to the Insurance Treatment of Pregnancy Under Title VII of the Civil Rights Act of 1964, as Amended.

1. Although the case before the Court arose out of a challenge to a pregnancy exclusion from a State disability insurance program designed to provide benefits for illness or injury, and although the case presents a narrow equal protection issue under the Fourteenth Amendment, its outcome may affect the interpretation and implementation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*, as amended by the Equal Employment Opportunity Act of 1972, P.L. 92-261. See the statement to the same effect by Circuit Judge Winter, dissenting in *Cohen* v. *Chesterfield County School Board*, 474 F.2d 395, 399-400 (4th Cir. 1973), presently pending in this Court after oral argument (No. 72-1129, Oct. Term, 1972).

Title VII of the Civil Rights Act of 1964, as amended in 1972, prohibits most private and public employers from discriminating against any individual in his employment, or from otherwise treating an employee adversely or unfairly, "because of [the] individual's . . . sex" (42 U.S.C. 2000e-2(a)), except "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise" (42 U.S.C. 2000e-2(e)(1)). To implement this statutory prohibition, the Equal Employment Opportunity Commission has published guidelines—upon which we comment below—stating

in part that "Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment." 29 C.F.R. 1604.10.[2] Thus, although the construction and application of Title VII are not before the Court, the reach of this case must be weighed in the light of the fact that the agency charged with administering Title VII has determined that a pregnancy exclusion like that here under attack would, if in a private or public employee disability plan,

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[2] The relevant guidelines, in full, are as follows:

"(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of Title VII.

"(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

"(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity."

violate the statutory prohibition against sex discrimination. In this connection, it is most significant that the Equal Employment Opportunity Commission in fact filed a brief in the court below in support of the instant Appellees. The brief made specific reference to the above-quoted EEOC guidelines on sex, and recited at the outset that the Commission was filing the brief "because it believes the standards the Court should apply in determining the constitutionality of § 2626 of the California Unemployment Insurance Code are similar to the standards which would be applied to the same policy if it were challenged under Title VII of the 1964 Civil Rights Act. . . . The Commission believes that, under both Title VII and the Fourteenth Amendment, a policy denying disability benefits to women workers disabled by pregnancy is illegal sex discrimination." The Commission, moreover, appeared and pressed this point in oral argument before the court below.[3] In sum, although Fourteenth Amendment and Title VII issues do not turn on the same considerations—for example, underlying Congressional intent could be decisive in ascertaining the meaning of Title VII—the likelihood

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[3] See also Memorandum For The United States As Amicus Curiae filed by the Solicitor General in Nos. 72-777 and 72-1129, *Cleveland Board of Education* v. *La Fleur* and *Cohen* v. *Chesterfield County School Board*, now pending in this Court after oral argument. There, in cases which also presented Fourteenth Amendment sex discrimination issues, the Solicitor General stressed the materiality of the relevant EEOC guidelines, and stated, ". . . the Court's resolution of the issue under the Equal Protection or Due Process Clause, while not dispositive may well bear on the validity of the guidelines." Memorandum, p. 2.

exists that this case may well affect the disposition of related Title VII cases.[4]

2. The ramifications of this case will affect insurance companies and virtually all employers in the United States who provide sickness and accident disability insurance for their employees. Here, statistics are revealing. Approximately 40 per cent of the work force under age 65, or some 32,168,000 employees, is covered by such insurance. Benefit periods under the insurance are not uniform: about 45 per cent of the plans provide 13 weeks of benefits; 50 per cent provide benefits for 26 weeks; and 5 per cent provide benefits for 52 weeks. But only about 42.6 per cent of the plans, covering about 13,500,000 employees, provide benefits for disability resulting from pregnancy or childbirth; and even here, where maternity coverage is provided, almost always the benefit period is no longer than six weeks. Thus about 57.4 per cent of the plans, covering about 18,600,000 employees, provide no maternity benefits whatever; and even under the relatively smaller number of plans that do provide benefits for pregnancy or childbirth, the benefits so provided are less (i.e., the benefit period is shorter) than those provided for non-pregnancy re-

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[4] In addition to the *Gilbert* case, *supra*, the following Title VII cases involving disparate treatment of pregnancy in the context of insurance or sick leave plans, are now pending in United States district courts: *Grogg* v. *General Motors Corporation*, No. 73 Civ. 63, S.D. N.Y.; *Communications Workers* v. *Southern Bell Tel. & Tel. Co.*, No. 73-C-959, N.D. Ill.; *Newman* v. *Delta Airlines, Inc.*, No. 15,681, N.D. Ga.; *E.E.O.C.* v. *E. I. duPont deNemours & Co.*, Civil Action No. 4515, D.C. Del.

lated disabilities.[5] According to one actuarial estimate,[6] the annual cost of adding maternity benefits to disability income protection plans currently in effect in the United States would be $1,353,000,000.

B. Current EEOC Guidelines Relating to the Treatment of Pregnancy Under Disability Insurance Plans are not Entitled to Judicial Deference.

We anticipate that the Equal Employment Opportunity Commission's current guidelines relating to the treatment for job-related purposes of disabilities due to pregnancy or childbirth, *supra* note 2, may be cited to the Court as a ground for dismissing Appellant's Jurisdictional Statement. For this reason, and even though the court below did not expressly advert to the guidelines, we comment on them here in order to show that they are not entitled to the deference normally accorded administrative interpretations. See *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944); *Udall* v. *Tallman*, 380 U.S. 1 (1965).

Guidelines on Discrimination Because of Sex were originally issued by the EEOC on November 24, 1965 (30 F.R. 14926); they were amended by the Com-

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[5] The statistical summary in the text with respect to employer-provided sickness and accident disability insurance coverage in the United States is derived from the testimony of Actuary Paul Jackson set forth at pp. 348-349 of the official transcript of proceedings in *Gilbert* v. *General Electric Company, supra*, No. 142-72-R, United States District Court for the Eastern District of Virginia, Richmond, Virginia. Mr. Jackson, a Fellow in the Society of Actuaries, has worked in the area of disability insurance coverages since 1956.

[6] By Actuary Paul Jackson, set forth in Defendant's Exhibit 42, *Gilbert* v. *General Electric Company, supra* note 5.

mission on February 21, 1968 (33 F.R. 3344), were again amended on August 19, 1969 (34 F.R. 13367), and were last amended and revised on March 31, 1972 (37 F.R. 6835). The earlier guidelines expressed no view with respect to the way disabilities resulting from pregnancy or childbirth were to be treated. Indeed, the topic was adverted to in the guidelines for the first time in 1972 when with the issuance of the amendments of March of that year, the guidelines in their present form, *supra* note 2, were published.

The position set forth in the current guidelines represents, moreover, a clear departure from, and contradiction of, the prior published position by the EEOC. The prior position was set forth in a series of opinion letters issued by the EEOC's General Counsel in 1966. These letters thus set forth the Commission's then position and policy:

> The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees. . . . we do not believe that an employer must provide the same fringe benefits for pregnancy as he provides for illness, and, consequently, it is our view that the policy you describe is not in violation of Title VII.
>
> * * * *
>
> Your second question is whether an employee disability benefit plan financed by both the employer and the employees may exclude from coverage disability resulting from the employee's pregnancy. You state that certain other forms

of disability, e.g., disability arising in the course of employment, disability arising from the employee's misconduct, etc., are likewise excluded.

In a recent opinion letter regarding pregnancy we have stated, "The Commission policy in this area does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees." Therefore, an insurance or other benefit plan may simply exclude maternity as a covered risk, and such an exclusion would not in our view be discriminatory. . . .[7]

In testimony given in *Gilbert* v. *General Electric Company, supra*, a former EEOC General Counsel,[8] who occupied that office for some 15 months in 1965 and 1966, stated with respect to the foregoing statements in 1966 EEOC letters that: (1) they reflected official EEOC policy during his incumbency as General Counsel; (2) during the first year of the EEOC's existence—i.e., the year beginning July 2, 1965—questions and problems respecting sex discrimination "occupied a good deal of the Commission's attention" and "were thoroughly discussed by the Com-

---

[7] The excerpted passages set forth in the text were identified as representative of similar statements in EEOC opinion letters issued in 1966 in response to inquiries made of the Commission. Testimony of Charles Duncan, Esq., former EEOC General Counsel, in *Gilbert* v. *General Electric Company*, No. 142-72-R, E.D. Va. See the Appendix hereto.

[8] Charles Duncan, Esq., currently President of the District of Columbia Bar. Pertinent excerpts from Mr. Duncan's testimony in the *Gilbert* case are set forth in the Appendix hereto.

mission," and, during the same period, the treatment of pregnancy disabilities under an employer's disability insurance plan was specifically considered by the full Commission; (3) in formulating its 1965-1966 policy, the Commission considered and inquired into the legislative history underlying Title VII with respect to sex discrimination; (4) the Commission's 1965-1966 policy and position was that pregnancy could be treated differently from "medical illness," and that under an employer-sponsored employee disability insurance plan it was not necessary "to provide the same benefits for maternity absence [as] for illness-caused absence;" and (5) in the course of its 1965-1966 deliberations on sex discrimination, the Commission "extensively considered" and discussed as a possible alternative the policy reflected in the current EEOC guidelines with respect to the treatment of pregnancy-caused disabilities under employee disability insurance plans, considering such a policy in the light of the legislative history underlying Title VII, but consciously and deliberately rejecting it.

In *Udall* v. *Tallman*, 380 U.S. 1, 16-23 (1965), the Court gave deference to an interpretation of the Secretary of the Interior only after a detailed analysis showed that his interpretation had been contemporaneous, consistent, heavily relied upon, and was not unreasonable. In *Griggs, et al.* v. *Duke Power Company*, 401 U.S. 424, 433-436 (1971), the Court did not accept the EEOC interpretation until it was convinced by a thorough review of the legislative history that "the conclusion is inescapable that the EEOC's construction . . . comports with Congressional intent." 401 U.S. at 436. These cases demon-

strate that judicial acceptance of administrative interpretations depends upon careful scrutiny; or, as this Court said in *Skidmore* v. *Swift & Co.*, *supra*, 323 U.S. at 140:

> The weight of such a judgment [i.e., the administrative interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements and all those factors which give it power to persuade, if lacking power to control.

The element of administrative consistency was subsequently emphasized in *National Labor Relations Board* v. *Boeing Co.*, 412 U.S. 67 (1973), where the Court, relying in part on the "Board's longstanding administrative construction" to uphold the Board's position that the Board is not required to inquire into the reasonableness of union fines, said (412 U.S. at 75):

> We have held in analogous situations that such a consistent and contemporaneous construction of a statute by the agency charged with its enforcement is entitled to great deference by the courts. [Citations omitted.]

Under these standards, we submit, the EEOC's 1972 guidelines here discussed are entitled to little, if any, weight: having been issued some seven years after Title VII went into effect, they do not represent a "contemporaneous construction;" and they certainly are not consistent with the previous 1966-1971 EEOC position and policy. Indeed, only the 1966-1971 EEOC policy and published construction meet the criteria for deference as enunciated by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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Dated: November 1973.

APPENDIX

Excerpts from the Official Transcript of Proceedings in *Gilbert v. General Electric Company*, No. 142-72-R, United States District Court for the Eastern District of Virginia:

* * * *

[542] *CHARLES DUNCAN* was called as a witness by and on behalf of the defendant and, having been first duly sworn, was examined and testified on his oath as follows:

* * * *

[549] DIRECT EXAMINATION

BY MR. STRAUSS:

Q Would you state your name and residence address, sir?

A Charles T. Duncan, D-u-n-c-a-n, 1812 Upshur, U-p-s-h-u-r Street, NW, Washington, D. C.

Q Mr. Duncan, what is your occupation or profession?

A I am an attorney at law admitted to practice in the District of Columbia.

* * * *

[550] Q Are you an officer of the District of Columbia Bar?

A Yes. We have a unified D. C. Bar and I am this year President of that organization.

Q Now, prior to your becoming engaged in the private practice of law in the District of Columbia were you employed in an official capacity by the District of Columbia Government?

A Yes. I was Corporation Counsel for the District of Columbia.

* * * *

[551] Q You were, were you not, at one time, employed by the EEOC?

A Yes, I was.

Q And in what capacity were you so employed?

A I was General Counsel of the Equal Employment Opportunity Commission.

Q And would you pinpoint the dates?

A I believe I became General Counsel on August 8, 1965, and I took the oath of office as Corporation Counsel on October 31, 1966.

I assume I went off the EEOC payroll on that date, but I am not sure.

Q You just don't remember, but in view—

A It was sometime very late in October.

Q In October, 1966?

A That is correct.

* * * *

[553] Q Mr. Duncan, the letter[s] which represent the Defendant's Exhibit Number 12, are you the author of the letter[s]?

A Well, let me respond this way. These letters were prepared in my office. As to whether I drafted particular language, I don't remember that, but I do recognize the two letters as being letters which were prepared in my office or certainly similar to letters which were prepared in my office.

* * * *

[555] Q Is it a fair statement to say, sir, that letters containing . . . similar opinions to those expressed therein were sent out by you before you left the Commission in response to inquiries made of the Commission?

A Yes.

* * * *

[559] Q Do you recall whether letters setting forth opinions such as those [set] forth in Defendant's Exhibit 12 were discussed at any time with the Commission?

A You mean on the specific point of pregnancy? Maternity leave?

Q The matters discussed and set forth in those letters?

A Yes.

This was one of the issues that I would not have decided on my own initiative, and indeed did not.

This particular question, how to treat [560] pregnancy and maternity leave, was particularly discussed at the Commission level and with senior staff in order to formulate the Commission's policy.

Q What about the matter of the treatment of pregnancy disabilities under an employment—under an employer's disability plan?

A That subject was discussed at the Commission level.

Q Do you recall who was present at these discussions?

A I cannot pinpoint a discussion or a date. I do know that this question was considered by the full Commission, and I know who the Commissioners were.

Q Now, do the letters, that is, do the letters which are in evidence as Defendant's Exhibit 12 reflect the policy of the EEOC during your incumbency as General Counsel with respect to the treatment of pregnancy disabilities under an employer disability benefit plan?

A Yes.

* * * *

[561] Q Now, how thoroughly was this matter discussed within the Commission?

A I would have to answer you this way. The whole question of sex discrimination occupied a good deal of the Commission's attention during the first year.

Pregnancy, maternity leave was one aspect of the sex discrimination.

It was also one of the problems that I think baffled the Commission the most. So I would say that this aspect of sex discrimination certainly as well as the broader problem of other aspects of sex discrimination were thoroughly discussed by the Commission.

Q When the Commission was consider[ing] the formulation of these policies which are set forth in the exhibit, was there any consideration given to the legislative history of Title 7 with respect to sex discrimination?

A Unfortunately, Mr. Strauss, as I am sure you know, there is little or no legislative history of Title 7 insofar as sex discrimination was concerned.

We wished that there had been some, but as you know, the word was added to race, color, religion, et cetera, not fortuitously but without any legislative history.

[562] Q But whatever legislative—but you did make an inquiry into the question of whether there was explicit legislative history?

A Oh, indeed, because in interpreting Title 7 we relied heavily on the legislative history whenever it was available. I am saying in the instance of sex discrimination there wasn't any.

* * * *

[563] Would you look at the last sentence, please, in the November 15 letter?

A Yes.

Q Would you explain, if you can, what the term "fringe benefits" means as used in that sentence?

A Yes. Fringe benefits would include wage continuation, pay, pay in the nature of sick pay, hospitalization, any other benefit like that applied in the case of absence due to other illnesses. But I think the chief thing was pay.

Q Pay continuation, are you saying?

A Yes.

Q During pregnancy?

A Yes. During the absence.

Q Whether or not the pregnancy was covered by a disability policy, is that what this refers to?

A No. I am trying to say that it was the Commission's position that pregnancy could be treated differently from a medical illness and that it was not necessary to make the same provision in the case of pregnancy as was made in the case of medical illness, be [564] it under company policy or under various sickness and health plans.

Q Now, would you look, please, at the November 10 letter, Mr. Duncan, and in particular to the last two paragraphs thereof?

A Yes.

Q I note that there is a reference in there to an employee disability plan, benefit plan financed by both the employer and the employees.

Would the response set forth in the letter have been any different had the letter been concerned with a disability benefit plan sponsored by the employer alone?

A No, clearly not. It was put that way because that is the way the question was put to us. It was our style to answer the question as asked. However

the plan is financed, on a contributory basis or solely by the employer, the Commission's policy was that you did not have to provide the same benefits for maternity absence that you did for illness-caused absence.

* * * *

[566] Q Mr. Duncan, to get on with it, have you had occasion to read the guidelines on discrimination because of sex which were issued by the EEOC in 1972?

A Yes, I have.

Q How recently was that?

A As recently as today.

Q You [are] then familiar with the policies expressed in such guidelines, that is the 1972 guidelines, concerning the matter of disability insurance coverage and so-called pregnancy and childbirth disabilities?

A Yes.

Q Now, in 1966 when the policy formulated in the letter[s] we have here was taking place, was there any discussion within the Commission of a policy such as appears in the 1972 guidelines?

A I would say yes, Mr. Strauss, to the best of my recollection.

As I indicated earlier, the Commission policy [567] on this point was extensively considered, various alternatives for treating this problem, how do you handle maternity leave, various alternatives were discussed.

One of the alternatives that was discussed was, necessarily, would have been to treat it as an illness-induced absence. So that was discussed, yes.

Q And rejected?

A Well, the Commission's policy was as these letters state.

Q So that this may be clear, [it] may have been evident, but I presume then that when the so-called 1972 policy was discussed in connection with the 1966 formulation the presence or absence of legislative history was also discussed at the same time?

A I am sure it was. I don't specifically remember that.

* * * *

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U. S.
FILED
NOV 24 1973
MICHAEL RODAK, JR., CL

No. 73-640

DWIGHT GEDULDIG,
Appellant,

vs.

CAROLYN AIELLO,
individually and on behalf of
all others similarly situated,
Appellees.

DWIGHT GEDULDIG,
Appellant,

vs.

AUGUSTINA D. ARMENDARIZ,
ELIZABETH B. JOHNSON,
JACQUELINE JARAMILLO,
individually and on behalf of all
other women similarly situated,
Appellees.

**Consolidated Cases on Appeal
from the United States District Court
for the Northern District of California**

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Appellees.

**Consolidated Cases on Appeal
from the United States District Court
for the Northern District of California**

MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment and order of the Three-Judge Court

convened in the Northern District of California be affirmed on the ground that the question presented by Appellant is so unsubstantial as not to warrant further argument.

OPINION BELOW

The Three-Judge Court held unconstitutional the third sentence of California Unemployment Insurance Code § 2626. That sentence provides:

> In no case shall the term "disability" or "disabled" include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter. . . .

In the context of California's liberal disability insurance program the Court held that this provision creates a classification with no fair and substantial relation to the legitimate state purpose and therefore deprives women suffering from pregnancy-related disabilities of the equal protection of the laws. The opinion of the Court is reported. *Aiello v. Hansen*, 359 F.Supp. 792 (N.D. Cal. 1973).

QUESTION PRESENTED

Whether a statute denying disability insurance benefits to an otherwise qualified applicant therefor, on the sole ground that the applicant's disability is related to or caused by pregnancy or childbirth, violates the equal protection clause of the Fourteenth

Amendment to the United States Constitution, where the statute is part of a comprehensive state disability insurance scheme providing such benefits to individuals disabled for virtually any other reason.

STATEMENT OF THE CASE

Appellees challenge the constitutionality of California Unemployment Insurance Code §2626 insofar as the State's comprehensive disability insurance program singles out and excludes from coverage any disability which arises out of or in connection with pregnancy. The Three-Judge District Court ruled that the exclusion of pregnancy-related disabilities from the program violates the equal protection clause of the Fourteenth Amendment to the United States Constitution.

The context of this constitutional challenge is California's disability insurance program, one of few such programs in the nation which attempts to partially compensate individuals for wage loss due to disabilities not compensated by workmen's compensation laws. The program taxes all covered workers in order to finance benefits to "mitigate the evils and burdens which fall on the unemployed and disabled worker and his family." (Unemp. Ins. Code § 2601.)[1]

---

[1]At the moment all workers are taxed one percent of their wages, up to a gross income of $8500. The limit on gross income taxable and the tax rate has varied on occasion, depending on the fiscal needs of the program. Benefit rates are structured so as to be quite progressive at lower income levels, i.e. workers with the lowest wages, who contribute least to the fund, receive more in benefits than they contribute. Unemp. Ins. Code §2655. Benefits

Pursuant to its compensatory purpose, the California disability insurance program pays benefits for a wide variety of disabilities. Benefits are paid for such common conditions as respiratory ailments, heart attacks, and broken bones, but also for disabling mental and physical conditions such as psychiatric disorders, obesity, alcoholism, drug addiction,[2] ailments caused by nicotine consumption, cosmetic surgery, attempted suicide, and even sex change operations. Sex-limited operations or conditions are also compensable, such as circumcisions, prostatectomies, and menopause.[3]

This all-embracing conception of compensable disability has been developed by Appellant pursuant to the governing statute, § 2626, which provides as follows:

> "Disability" or "disabled" includes both mental or physical illness and mental or physical injury. An individual shall be deemed disabled in any

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are thus related to contributions, but not proportionately. Neither weekly benefit amounts nor length of coverage (limited to 26 weeks in all cases) varies according to actuarial differences among covered workers. Rather, actuarial risks are all pooled, with benefits dependent only on previous income and length of disability.

[2]Benefits are paid to dipsomaniacs, drug addicts, and sexual psychopaths unless they are confined to an institution pursuant to commitment or court order. Unemp. Ins. Code §2678.

[3]Various statutory and administrative rules ensure that only those who are truly incapacitated from performing their regular work receive benefits. Claims must be accompanied by a doctor's affidavit attesting to the existence of the disability. Unemp. Ins. Code §§2627(d), 2708-2710. The individual must submit to such examinations as may be required by the appellant. Unemp. Ins. Code §2627(e). Appellant also maintains "yardstick" standards measuring the likely time duration of various types of disabilities, and may further investigate claims of unusual duration. In the absence of hospitalization, benefits are not paid until the eighth day of disability.

> day in which, because of his physical or mental condition, he is unable to perform his regular or customary work. In no case shall the term "disability" or "disabled" include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter.

The *only* disability which is not compensated by California's disability insurance program is that caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter.[4]

Given the purposes of California's disability insurance program, *and especially given the broad range of compensable disabilities in the California program,* Appellees challenged the singular exclusion of disabilities caused by or arising in connection with

---

[4]Section 2626 has been amended, effective January 1, 1974, to provide benefits relating to pregnancy where the disability is caused by an abnormal and involuntary complication of pregnancy (Unemp. Ins. Code §2626.2, as added by Stats. 1973, C. 1026.) Benefits would not be available for injuries sustained "voluntarily", such as from the surgical operation known as an episiotomy, or for injuries sustained "normally", such as the open wound in the uterus caused by the separation of the placenta from the uterine wall, a wound which is healed by the process known as involution of the uterus. The amended version of §2626 is not before this Honorable Court. Appellees and the class they represent, including intervenors, have a continuing substantial monetary interest in invalidating the statute as it now reads. Nevertheless, it should be pointed out that many of the constitutional infirmities of the current statute have been continued in the amended version. Most of Appellees' arguments herein apply, therefore, with equal vigor to new §2626.2 as well as to current §2626.

pregnancy as discriminatory against women on the basis of their sex.[5]

In a closely reasoned opinion, the Three-Judge District Court rendered judgment, pursuant to F.R. Civ.P. Rule 54(b), holding the statute unconstitutional as prayed and enjoining its further enforcement.[6]

THE QUESTION IS SO UNSUBSTANTIAL AS NOT TO WARRANT FURTHER ARGUMENT

Appellant now claims that the District Court erred for two reasons: (1) that "normal pregnancy is substantially different from illness or injury"; and (2) that fiscal economy is a legitimate state purpose which may justify sex discrimination. The first of these arguments is unsubstantial in large part because it is irrelevant to the issues of this case. The second argument is unsubstantial because the issue has clearly

---

[5]The *Aiello* case was filed in the United States District Court for the Northern District of California in July 1972. The *Armendariz* action was commenced in the California Supreme Court in August 1972 and was removed by Appellant to the federal forum soon thereafter.

The *Armendariz* appellees moved to stay proceedings pending state court resolution of their claims that the challenged statute violates the equal protection guarantees of the California Constitution (Cal. Const. Art. I, Secs. 11 and 21) and Article XX, Section 18 of the California Constitution, which prohibits employment discrimination on the basis of sex, as construed by the California Supreme Court in *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 95 Cal. Rptr. 329 (1971). The motion was denied. The *Aiello* and *Armendariz* actions were then consolidated in December 1972. Intervenor labor organizations were granted intervenor status in January 1973.

[6]The judgment did not adjudicate plaintiffs' motion for certification of the class, prayer for an award of attorneys fees, or claim for retroactive application of the judgment. These matters remain to be adjudicated.

been decided against Appellant in earlier decisions of this Court.

ARGUMENT

1. APPELLANT'S ARGUMENTS REGARDING "NORMAL PREGNANCY" ARE IRRELEVANT TO THIS ACTION AND IN ANY EVENT UNSUBSTANTIAL.

Appellant first declares the holding of the court below to be "that normal pregnancy shall be treated as an illness or injury" (Jurisdictional Statement, p. 8) and then shows that "pregnancy" is not an illness or injury, implying finally that Appellees seek "maternity benefits." The argument warrants no further consideration by this Court because it has nothing to do with this action.

The question faced by the court below was not whether normal pregnancy is or is not an illness or injury. Nor was the question of benefits for child rearing —maternity benefits—ever before the court. From the outset Appellees have contended only that disabilities *resulting from* pregnancy and childbirth must be treated like other disabilities now compensated under the California program. The court below so held.

These disabilities result from such pregnancy-caused injuries as damage to the tissues caused by surgical incisions for ectopic pregnancies, caesarian section delivery, and episiotomies; lacerations to the cervix and other parts of the vaginal tract caused by normal childbirth; and the wound to the uterus caused by separation of the placenta from the uterine wall during birth or miscarriage. Substantial hor-

monal imbalances resulting from delivery, which frequently result in disabling postpartum depression, and puerperal infection are examples of pregnancy-related illnesses which may cause inability to perform one's customary or regular work.[7] Appellant understandably submitted no evidence or testimony in the Court below to demonstrate that (1) such disabilities are not illnesses or injuries as those terms are applied in the California program or (2) such disabilities are distinguishable in any way from disabilities which are compensated by the California program.

The fact that pregnancy itself may not be a sickness or injury is not an issue.[8] Neither is the sociological study of pregnancy as a "sick role". The issue is not pregnancy, but pregnancy-related disabilities.

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[7]Any standard medical text describes all these pregnancy-related disabilities. See, for example, DeLee & Greenhill, *Principles and Practice of Obstetrics* (9th Ed. 1947), ch. 21; Kimbrough & Lull, *Clinical Obstetrics* (1954), ch. 25; Eastman & Hellman, *Williams Obstetrics* (13th Ed. 1966), ch. 17.

Williams Obstetrics, supra, for example, describes the separation of the placenta from the uterus in pertinent part as follows: "As separation proceeds, a hematoma forms between the separating placenta and the remaining decidua basalis." (*Id.* at p. 377.) *Williams* further describes first and second degree lacerations of the vaginal tract to be extremely common, stating that episiotomies are employed to minimize such lacerations. (*Id.* at 433.) The condition of the perineum after the surgical incision which constitutes the episiotomy is described as a "gaping wound." *(Id.)* Cervical lacerations are described in *Williams* at 921-924.

[8]Even if Appellant's point were relevant to this action, he certainly would not depend for his facts upon depositions taken in another, unrelated action. (See Jurisdictional Statement at p. 4.) The fact is that Appellant did not present *any* evidence below regarding physiologic aspects of pregnancy or pregnancy-caused disabilities.

The decision of the District Court in this regard was clearly correct. Construing the definitional problem of disability with respect to California practice, the Court found that the program "provides benefits to persons unable to perform their customary work because of nearly any physical or mental condition"; and "on account of nearly any incapacity." 359 F. Supp. at p. 794.[9] The Court then discussed the similarity of pregnancy-related disabilities to those now compensated:

> Pregnancy is clearly a unique human condition; only pregnancy can result in the birth of a child. For a woman, however, the effects of pregnancy and pregnancy-related illness are debilitating in much the same way as the physical and mental conditions that are included within the scope of the disability insurance program. 359 F.Supp. at p. 797.

Having found the only disabilities excluded from the program to be similar for purposes of the pro-

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[9]The first sentence of §2626 provides that "disability" includes mental or physical illness or injury. The second sentence, however, states that an individual is disabled when, *"because of his physical or mental condition"*, he cannot perform his customary work. (Emphasis added.) At oral argument on motions for summary judgment (e.g., RT 65, line 22 through RT 68, line 2 (Feb. 22, 1973)) and for a stay pending appeal (e.g., RT 28, line 7 through RT 29, line 3 (Sept. 6, 1973)), the court recognized the law to be unsettled regarding whether a compensable disability must be an injury or an illness or may also be a "condition". Appellant presented no points or authorities regarding proper statutory interpretation of this conflicting language. Appellees argued that the statute may be properly interpreted by analogy to those disabilities which are compensated under the program. Cosmetic surgery, obesity, menopause, and sex change operations are not usually thought of as "illnesses" or "injuries", but are compensable under the California disability insurance program when they prevent an individual from performing his customary or regular work.

gram to those included, the court looked to the test of the validity of classifications enunciated by this Court in *Reed v. Reed,* 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed. 225; whether the classification "rest(s) upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[10] (404 U.S. at 75.) Because pregnancy-related disabilities are not physiologically distinguishable from other compensated disabilities and because women disabled by labor and delivery or other pregnancy-related illnesses or injuries suffer from the same economic hardship as do other disabled workers, the court found the exclusion unrelated to the expressed legislative purpose of the act. (Cal. Unemp. Ins. Code, §2601.)

The finding that pregnancy-related disabilities are comparable to compensated disabilities is a factual determination based on the evidence before the lower court. Appellant raised no argument below to dispute this finding and does not do so here. The court's holding that the statute cannot withstand constitutional scrutiny represents a simple application of the *Reed* standard. Appellant agrees that this is the proper standard of review. This issue therefore presents no substantial question of fact or law which would warrant further argument before this Court.

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[10]The court refused to consider Appellee's claim that the statute must be regarded with "strict scrutiny" and could only be justified if necessary to a compelling state interest on the ground that the statute was invalid even under the less vigorous *Reed* test, citing *Eisenstadt v. Baird,* 405 U.S. 438, 447 n. 7, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972).

2. COST ALONE CANNOT JUSTIFY EXCLUDING PREGNANCY-RELATED DISABILITIES WHERE THERE IS NO RATIONAL BASIS FOR SELECTING THOSE PARTICULAR DISABILITIES TO CONSERVE FUNDS.

Having held that workers disabled by pregnancy-related disabilities were similarly situated to other disabled workers with respect to the stated primary purpose of the disability program, the lower court went on to hold that the exclusion of pregnancy-related disabilities failed to bear a fair and substantial relationship to the secondary purposes urged by the state as justification for the exclusion, as well.

Appellant urges first, that the additional costs of covering pregnancy-related disabilities justifies their exclusion; and, second, that the exclusion does not constitute sex discrimination because women on the average already receive more in benefits than they contribute to the program, whereas men receive less.

The Three-Judge District Court correctly rejected both arguments, holding that (1) the increased costs to the program of paying benefits for pregnancy-related disabilities did not justify excluding such disabilities from coverage, and (2) the fact that women as a class receive more benefits than they contribute is not a justification for discrimination in a program that does not determine contribution rates or eligibility for benefits on an actuarial basis.

a. Decisions of this Court and lower courts make clear that a monetary savings cannot alone justify discrimination on the basis of sex.

Appellant argues that it would cost more to provide coverage for pregnancy-related disabilities, and that

this additional expense justifies excluding such disabilities from coverage. The District Court correctly rejected these claims, stating that (1) the specter of increased costs cannot constitutionally justify an otherwise arbitrary and invidious classification; (2) Appellant has constitutional alternatives for reducing overall program costs; and (3) Appellant's bases for predicting large increases in costs are without sound foundation.

As the court below recognized (359 F.Supp. at 798), it is well settled that a state may protect the fiscal integrity of its programs, but not by making invidious distinctions between classes of its citizens. *Shapiro v. Thompson*, 394 U.S. 618, 633. Cost alone cannot render a classification rational.[11] In the instant case, as the court held, Appellant could rationally limit costs by excluding or limiting all claims in excess of certain amounts, but cannot exclude a whole class of disabled persons from coverage because of some stereotyped prediction that all pregnancy-

[11] *Jefferson v. Hackney*, 406 U.S. 535 (1972), cited by Appellant for the proposition that the fact certain groups are disadvantaged by legislation, taken alone, is not enough to establish an equal protection violation (Juris. Statement, p. 17, fn. 20), is in no way inconsistent with the holding of the Three-Judge District Court in the instant case. First, while that case is sometimes cited for the proposition that classes can be disadvantaged for purposes of saving money, *Jefferson* requires that the disadvantaged class must be selected on rational grounds. As discussed in the text no such reason exists in this case for singling out pregnancy-related disabilities to conserve funds. Second, *Jefferson* applies a less rigorous rational basis standard than does *Reed*, the controlling precedent in this sex discrimination case. (See pp. 9-10, *supra*.) The state cannot show a difference between pregnancy-related disabilities and the disabilities currently compensated bearing a fair and substantial relationship to the object of the legislation. (Pages 7-9, *supra*.)

related disabilities will be of inordinate length and expense. 359 F.Supp. at 799. While some claims by these workers will be large, others will not, contrary to stereotyped notions about pregnancy and childbirth. The state can limit all large claims, but it cannot single out a disability for which some claims may be large and preclude all such claims, large and small, from disability coverage. 359 F.Supp. at 798-800.

Under the circumstances, the exclusion of pregnancy-related disabilities is as irrational and invidious as the exclusion of indigent children from the schools to reduce education expenditures. See *Shapiro v. Thompson,* 394 U.S. 618, 633 (1969). There exists no distinguishing feature of pregnancy-related disabilities which would warrant singling those disabilities out for purposes of economy.

In so holding, the district court was merely following the precedent set in *Reed, supra,* and *Frontiero v. Richardson,* 411 U.S. 677, 93 S.Ct. 1764 (1973). The lower court in *Reed,* yielding to the argument that men on the average are better able to administer estates than women, upheld, in the interests of judicial efficiency, a provision of the Idaho Probate Code which preferred men over women in the administration of estates. This court reversed, holding that "to give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment . . ." *Reed v. Reed,* 404 U.S. 71, 75. Simi-

larly, in *Frontiero,* this Court rejected the Government's argument that it was cheaper and easier conclusively to presume that wives of male members of the military are financially dependent upon their husbands, while requiring that female members establish dependency in fact for purposes of obtaining certain housing and medical benefits. The Three Judge District Court in this case, as the Supreme Court in those, did not permit an exclusion from privileges or benefits based upon generalizations about women. As in *Reed,* the district court required that women disabled by pregnancy-related disabilities be permitted to obtain medical proof of their disability and become eligible for benefits on the same basis as all other disabled persons. Because the district court did no more than apply the relevant precedents with respect to the cost issue, that issue does not present a substantial question for review by this Court.

Finally, the court below correctly noted that Appellant's predictions of large increases in cost are without firm foundation.[12]

> Unfortunately, it is impossible to determine if the cost of including these disabilities is substantially greater than the costs of including other disabilities, because, according to defendant, no statistics are available indicating the cost to the program of paying benefits on account of various

[12]Even if Appellant's cost estimates were serendipitously correct, the District Court pointed out, the entire cost increase estimated by Appellant could be met by requiring workers to contribute an additional amount of approximately 0.364 percent of their salary, thus increasing the maximum annual contribution from $85 to $119 per year, an increase of approximately $2.80 per month for those in the highest wage bracket. (359 F. Supp. at 798.)

disabilities presently covered. (359 F.Supp. at 798.)[13]

More general information compiled by the federal government, however, indicates that both in terms of bed disability and restricted activity, such conditions as fractures, dislocations and sprains, influenza, upper respiratory conditions and viruses take a greater toll than deliveries and disorders of pregnancy and the puerperium. U.S. Department of Health, Education and Welfare, *Current Estimates from the Health Interview Survey* (1967), tables 3 and 4, pages 9 and 10. A copy of these tables is attached as Appendix A. Moreover, during the childbearing years, women show less than a day and a half more work loss than men

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[13]The state relies heavily on the fact that at the time California passed its statute, Rhode Island had included pregnancy in its disability program and had concluded that coverage for pregnancy-related disabilities was too expensive. Costs were high in that program because disabilities relating to pregnancy were not in fact treated like all other disabilities. Unfortunately, the board which administered the statute allowed pregnant women to collect benefits even for the period they were not actually disabled. In "Childbirth and Child Rearing Leave: Job-Related Benefits," 17 New York Law Forum 480, 485 (1971), Elizabeth Duncan Koontz, at that time Director of the Women's Bureau, U.S. Department of Labor, described the Rhode Island experience as follows:

> The Unemployment Compensation Board held that pregnancy . . . was . . . compensable under the law. Unfortunately, however, the board did not treat pregnancy like other physical conditions. Eligibility for benefits in cases of pregnancy did *not* depend on actual inability to work as required in the law, but was based upon the existence of the condition of pregnancy. In effect, any time a woman was not working during the entire period of pregnancy, regardless of the reason, she could draw benefits . . .

Under these conditions, high costs in the Rhode Island program were inevitable. In effect, Rhode Island gave pregnant women a special benefit, simply because they were pregnant and regardless of their physical condition. In the present case, pregnant women are not asking for special benefits, but merely for equal treatment during the period they are actually disabled.

per year, women missing 5.9 days work annually and men missing 4.5 days. (*Current Estimates, supra,* table 16, p. 22.)

In summary, then, Appellant presents no substantial question for review by this Court because (1) the law is settled that costs alone cannot justify the discrimination practiced by Appellant herein and, moreover, because (2) Appellant has failed to show either that costs for covering pregnancy-related disabilities would be great or that such costs would in any way differ or be greater than the cost of covering other disabilities.

b. Appellant's contention that no sex discrimination exists because women receive more in benefits than they contribute to the program does not merit review by this Court.

Appellant contends that women already receive more in benefits than they contribute in payroll taxes to the program, and that for this reason alone no sex discrimination can be said to exist. This argument first ignores the structure of the California program, which ensures that lower paid workers will receive more in benefits than they contribute. Cal. Unemp. Ins. Code §2655. Women earn about two thirds the wages that men earn. Therefore, although women constitute 40% of the California covered work force, they contribute only 28% of the program's funds. Significantly women receive less in benefits than their percentage of the work force would lead one to expect, receiving only 38% of benefits for their 40% of the work force. See *Aiello v. Hansen,* 359 F.Supp. at 800. The short answer to Appellant's argu-

ment, therefore, is that women receive a lesser percentage of benefits than their percentage of the work force, but that this statistic is just as irrelevant as that presented by Appellant.

Appellant's contention might arguably have merit if the state disability program based tax rates, benefits or coverage on actuarial considerations. But the program has never attempted to limit coverage on considerations such as age, occupation, previous health history or the statistical probability that certain illnesses or injuries will occur more frequently in certain age groups (e.g., the likelihood that men over the age of 55 will get heart attacks). The state therefore cannot selectively argue that such considerations justify the discrimination in this case.[14]

Stripped of the actuarial argument, case law requires that workers suffering from pregnancy-related disabilities be treated like all other disabled workers without regard to the fact that women on the average receive more benefits for their contribution than do men on the average.

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[14]In *Shapiro v. Thompson*, 394 U.S. 618 (1969), the court suggests in a footnote that state insurance programs may legitimately tie the amounts of benefits to the individual's contribution. Contrary to Appellant's footnote 19 (Jurisdictional Statement, p. 17), the Three-Judge District Court's decision deals directly with the *Shapiro* footnote. It states:

> Even if the state could constitutionally create a disability insurance program based upon actuarial data and tie the amount of benefits various groups would receive to the amount they contribute, the California disability insurance program is not such a program. Indeed, the program has a scale of benefits which is designed so that its likely effect will be that those earning small incomes will receive more in benefits than they contribute.
> (359 F.Supp. at 800.)

The lesson of *Reed* and *Frontiero* is that courts will no longer tolerate sex-averaging as a justification for discriminating against individuals or subgroups on the basis of sex. The obvious consequence of the refusal to allow sex-based generalization in both the *Reed* and *Frontiero* decisions was higher cost, in *Reed* to the courts and in *Frontiero* to the military. Yet this Court refused to permit cost to justify the discrimination.

Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971), a case decided under Title VII of the Civil Rights Act of 1964, is also instructive on this point. In *Phillips*, a woman sued Martin-Marietta Corporation for denying her a job under its policy against hiring women with preschool aged children. The Court of Appeals for the Fifth Circuit held that the failure to hire her did not constitute sex discrimination because 75 to 80 percent of the persons hired for the position she sought were women. This Court rejected the averaging argument, holding that the policy discriminating against the subgroup of women with preschool age children constituted sex discrimination under section 703 of the Civil Rights Act.

Thus, the resolution of this issue, like the resolution of the other issues raised by the Appellant, is dictated by established precedent and fails to present a substantial question for resolution by this Court.

CONCLUSION

While the question of how pregnancy should be treated in law and practice is an important one for

working women, the context in which it arises here presents no substantial questions of law requiring resolution by this Court. Appellant's contentions are either irrelevant to this case or have been decided against him previously by this Court. Appellant strains to render the issue of "pregnancy" relevant to this action by reference to cases involving private employers. But what is involved here is one state disability program, with its own unique purposes, history, and operation. The courts' narrowly-drawn opinion holds only that, within that program, the exclusion of pregnancy-related disabilities cannot be constitutionally justified.

For the foregoing reasons, the judgment of the Three-Judge District Court should be affirmed.

Dated, November 23, 1973.

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(Appendix A Follows)

[Data are based on household interviews of the civilian, noninstitutional population. The survey design, general qualifications, and information on the reliability of the estimates are given in Appendix I. Definitions of terms are given in Appendix II]

CONDITION GROUP	BOTH SEXES	MALE	FEMALE	BOTH SEXES	MALE	FEMALE
	DAYS OF RESTRICTED ACTIVITY IN THOUSANDS			DAYS OF RESTRICTED ACTIVITY PER 100 PERSONS PER YEAR		
ALL ACUTE CONDITIONS	1,455,088	638,154	816,934	752.4	684.6	815.4
INFECTIVE AND PARASITIC DISEASES	177,177	85,914	91,263	91.6	92.2	91.1
COMMON CHILDHOOD DISEASES	54,269	25,579	29,690	28.1	30.7	29.6
THE VIRUS, N.C.S.	79,628	34,894	44,734	41.2	37.4	44.6
OTHER INFECTIVE AND PARASITIC DISEASES	43,280	22,441	20,839	22.4	24.1	20.8
RESPIRATORY CONDITIONS	653,665	286,295	367,370	338.0	307.1	366.7
UPPER RESPIRATORY CONDITIONS	352,180	158,736	193,444	182.1	170.3	193.1
COMMON COLD	266,187	120,722	145,464	137.6	129.5	145.2
OTHER ACUTE UPPER RESPIRATORY CONDITIONS	85,993	38,014	47,980	44.5	40.8	47.9
INFLUENZA	241,622	99,708	141,915	124.9	107.0	141.6
INFLUENZA WITH DIGESTIVE MANIFESTATIONS	25,466	11,342	14,123	13.2	12.2	14.1
OTHER INFLUENZA	216,157	88,366	127,791	111.8	94.8	127.5
OTHER RESPIRATORY CONDITIONS	59,862	27,851	32,011	31.0	29.9	31.9
PNEUMONIA	29,441	12,694	16,547	15.2	13.6	16.5
BRONCHITIS	25,820	12,736	13,083	13.4	13.7	13.1
OTHER ACUTE RESPIRATORY CONDITIONS	4,602	2,221	2,381	2.4	2.4	2.4
DIGESTIVE SYSTEM CONDITIONS	67,964	31,251	36,712	35.1	33.5	36.6
DENTAL CONDITIONS	17,922	6,402	11,521	9.3	6.9	11.5
FUNCTIONAL AND SYMPTOMATIC UPPER GASTROINTESTINAL DISORDERS, N.E.C.	7,277	3,291	3,986	3.8	3.5	4.0
OTHER DIGESTIVE SYSTEM CONDITIONS	42,764	21,558	21,206	22.1	23.1	21.2
INJURIES	332,088	169,824	162,264	171.7	182.2	162.0
FRACTURES, DISLOCATIONS, SPRAINS, AND STRAINS	183,387	92,308	91,079	94.8	99.0	90.9
FRACTURES AND DISLOCATIONS	107,990	53,454	54,536	55.8	57.3	54.4
SPRAINS AND STRAINS	75,397	38,854	36,543	39.0	41.7	36.5
OPEN WOUNDS AND LACERATIONS	48,157	28,088	20,070	24.9	30.1	20.0
CONTUSIONS AND SUPERFICIAL INJURIES	45,569	19,100	26,468	23.6	20.5	26.4
OTHER CURRENT INJURIES	54,974	30,327	24,647	28.4	32.5	24.6
ALL OTHER ACUTE CONDITIONS	224,195	64,873	159,325	115.9	69.6	159.0
DISEASES OF THE EAR	31,134	15,665	15,438	16.1	16.8	15.4
HEADACHES	4,342	1,788	2,554	2.2	1.9	2.5
GENITOURINARY DISORDERS	34,431	5,298	29,132	17.8	5.7	29.1
DELIVERIES AND DISORDERS OF PREGNANCY AND THE PUERPERIUM	41,830	...	41,830	21.6	...	41.8
DISEASES OF THE SKIN	14,664	5,071	9,593	7.6	5.4	9.6
DISEASES OF THE MUSCULOSKELETAL SYSTEM	27,318	8,891	18,427	14.1	9.5	18.4
ALL OTHER ACUTE CONDITIONS	70,507	26,157	42,350	36.5	30.2	42.3

NOTE: N.O.S.—not otherwise specified; n.e.c.—not elsewhere classified.

TABLE 4. DAYS OF BED DISABILITY ASSOCIATED WITH ACUTE CONDITIONS AND DAYS OF BED DISABILITY PER 100 PERSONS PER YEAR, BY SEX AND CONDITION GROUP: UNITED STATES 1967

Data are based on household interviews of the civilian, noninstitutional population. The survey design, general qualifications, and information on the reliability of the estimates are given in Appendix I. Definitions of terms are given in Appendix II.

CONDITION GROUP	BOTH SEXES	MALE	FEMALE	BOTH SEXES	MALE	FEMALE
	DAYS OF BED DISABILITY IN THOUSANDS			DAYS OF BED DISABILITY PER 100 PERSONS PER YEAR		
ALL ACUTE CONDITIONS	611,158	264,635	346,523	316.0	283.9	345.9
INFECTIVE AND PARASITIC DISEASES	84,496	39,792	44,704	43.7	42.7	44.6
COMMON CHILDHOOD DISEASES	20,157	9,127	11,030	10.4	9.8	11.0
THE VIRUS, N.O.S.	41,872	18,163	23,708	21.7	19.5	23.7
OTHER INFECTIVE AND PARASITIC DISEASES	22,466	12,501	9,967	11.6	13.4	9.9
RESPIRATORY CONDITIONS	315,636	138,761	176,875	163.2	148.9	176.5
UPPER RESPIRATORY CONDITIONS	149,469	67,945	81,524	77.3	72.9	81.4
COMMON COLD	109,574	50,114	59,460	56.7	53.8	59.3
OTHER ACUTE UPPER RESPIRATORY CONDITIONS	39,896	17,831	22,065	20.6	19.1	22.0
INFLUENZA	132,857	55,203	77,654	68.7	59.2	77.5
INFLUENZA WITH DIGESTIVE MANIFESTATIONS	14,059	6,788	7,271	7.3	7.3	7.3
OTHER INFLUENZA	118,798	48,416	70,383	61.4	51.9	70.2
OTHER RESPIRATORY CONDITIONS	33,310	15,612	17,697	17.2	16.7	17.7
PNEUMONIA	16,936	8,138	8,799	8.8	8.7	8.8
BRONCHITIS	15,077	7,064	8,012	7.8	7.6	8.0
OTHER ACUTE RESPIRATORY CONDITIONS	*	*	*	*	*	*
DIGESTIVE SYSTEM CONDITIONS	33,287	16,021	17,266	17.2	17.2	17.2
DENTAL CONDITIONS	7,363	3,263	4,101	3.8	3.5	4.1
FUNCTIONAL AND SYMPTOMATIC UPPER GASTROINTESTINAL DISORDERS, N.E.C.	3,960	2,021	1,939	2.0	2.2	1.9
OTHER DIGESTIVE SYSTEM CONDITIONS	21,964	10,737	11,226	11.4	11.5	11.2
INJURIES	68,651	44,432	44,220	45.8	47.7	44.1
FRACTURES, DISLOCATIONS, SPRAINS, AND STRAINS	44,882	22,573	22,309	23.2	24.2	22.3
FRACTURES AND DISLOCATIONS	28,472	14,909	13,563	14.7	16.0	13.5
SPRAINS AND STRAINS	16,410	7,664	8,746	8.5	8.2	8.7
OPEN WOUNDS AND LACERATIONS	9,459	4,884	4,575	4.9	5.2	4.6
CONTUSIONS AND SUPERFICIAL INJURIES	13,456	5,302	8,154	7.0	5.7	8.1
OTHER CURRENT INJURIES	20,855	11,672	9,183	10.8	12.5	9.2
ALL OTHER ACUTE CONDITIONS	89,087	25,630	63,457	46.1	27.5	63.3
DISEASES OF THE EAR	10,665	5,223	5,457	5.5	5.6	5.4
HEADACHES	2,344	*	1,662	1.2	*	1.7
GENITOURINARY DISORDERS	17,198	3,324	13,874	8.9	3.6	13.8
DELIVERIES AND DISORDERS OF PREGNANCY AND THE PUERPERIUM	18,183	...	18,183	9.4	...	18.1
DISEASES OF THE SKIN	4,582	*	3,495	2.4	*	3.5
DISEASES OF THE MUSCULOSKELETAL SYSTEM	9,490	3,093	6,396	4.9	3.3	6.4
ALL OTHER ACUTE CONDITIONS	26,606	12,217	14,389	13.8	13.1	14.4

NOTE: N.O.S.—not otherwise specified; n.e.c.—not elsewhere classified.

TABLE 16. DAYS OF DISABILITY AND DAYS OF DISABILITY PER PERSON PER YEAR, BY SEX AND AGE: UNITED STATES, 1967

[Data are based on household interviews of the civilian, noninstitutional population. The survey design, general qualifications, and information on the reliability of the estimates are given in Appendix I. Definitions of terms are given in Appendix II]

SEX AND AGE	RESTRICTED-ACTIVITY DAYS	BED-DISABILITY DAYS	WORK-LOSS DAYS[1]
	DAYS OF DISABILITY IN THOUSANDS		
BOTH SEXES			
ALL AGES	2,953,202	1,109,428	406,00[illegible]
UNDER 17 YEARS	617,567	270,892	...
17-24 YEARS	231,201	100,551	59,142
25-44 YEARS	627,374	232,125	154,522
45-64 YEARS	831,531	282,447	170,043
65 & OVER YEARS	645,529	223,413	22,296
MALE			
ALL AGES	1,296,362	464,461	251,652
UNDER 17 YEARS	322,351	135,529	...
17-24 YEARS	89,337	35,399	30,937
25-44 YEARS	236,338	85,939	92,199
45-64 YEARS	390,735	126,285	113,303
65 & OVER YEARS	257,600	81,309	15,213
FEMALE			
ALL AGES	1,656,840	644,967	154,352
UNDER 17 YEARS	295,215	135,363	...
17-24 YEARS	141,864	65,151	28,205
25-44 YEARS	391,036	146,186	62,323
45-64 YEARS	440,796	156,162	56,740
65 & OVER YEARS	387,929	142,104	7,084
	DAYS OF DISABILITY PER PERSON PER YEAR		
BOTH SEXES			
ALL AGES	15.3	5.7	5.4
UNDER 17 YEARS	9.2	4.0	...
17-24 YEARS	9.9	4.3	4.2
25-44 YEARS	13.8	4.1	5.[illegible]
45-64 YEARS	[illegible]	[illegible]	[illegible]
65 & OVER YEARS	35.8	12.4	6.[illegible]
MALE			
ALL AGES	13.9	5.0	5.3
UNDER 17 YEARS	9.5	4.0	...
17-24 YEARS	8.3	3.3	4.[illegible]
25-44 YEARS	10.9	4.0	4.5
45-64 YEARS	20.6	6.7	6.7
65 & OVER YEARS	33.0	10.4	6.9
FEMALE			
ALL AGES	16.5	6.4	5.[illegible]
UNDER 17 YEARS	9.0	4.1	...
17-24 YEARS	11.2	5.2	4.[illegible]
25-44 YEARS	16.5	6.2	5.[illegible]
45-64 YEARS	21.3	7.6	5.[illegible]
65 & OVER YEARS	38.0	13.9	6.4

[1]Work loss reported for currently employed persons aged 17 years and over.

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In the Supreme Court
OF THE
United States

OCTOBER TERM 1973

No. 73-640

DWIGHT GEDULDIG, *Appellant,*

VS.

CAROLYN AIELLO, individually and on behalf of all others similarly situated, *Appellees.*

DWIGHT GEDULDIG, *Appellant,*

VS.

AUGUSTINA D. ARMENDARIZ, ELIZABETH B. JOHNSON, JACQUELINE JARAMILLO, individually and on behalf of all other women similarly situated, *Appellees.*

Consolidated Cases on Appeal from the United States District Court for the Northern District of California

BRIEF OF PACIFIC LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF APPELLANT

OPINION BELOW

The three-judge court, United States District Court for the Northern District of California, in an opinion

not yet reported, declared that the third sentence of the California Unemployment Insurance Code, Section 2626, which excludes pregnancy from State Disability Insurance Coverage, deprives pregnant women of the equal protection of the laws contrary to the Fourteenth Amendment and is therefore void.

INTEREST OF AMICUS CURIAE

Pacific Legal Foundation is a nonprofit corporation organized and existing under the laws of California for the purpose of engaging in litigation on behalf of California citizens in matters affecting the public interest.

Policy for the Pacific Legal Foundation is established by a Board of Trustees composed of concerned California citizens. Nine of the seventeen-member Board are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community.

The State Disability Insurance program at issue is but one part of a comprehensive plan of social and economic legislation established by the California Legislature. State Disability Insurance interacts with other legislative programs such as unemployment insurance, workmen's compensation, and aid to families with dependent children to provide a balanced system of social and economic protection for California citizens. This comprehensive plan has been established by the California Legislature to provide the maxi-

mum level of protection at an equitable cost to the California citizen.

The Pacific Legal Foundation appears here because of its conviction that the citizens of California have been deprived by the decision of the court below of their right to have the level of disability benefits and the costs thereof set by their own legislature, lawfully elected and responsive to the needs of these citizens. The Pacific Legal Foundation is concerned that the decision below typifies a trend in some lower courts to impose philosophies upon the public in the name of equal protection but without other regard to law or constitution.

Pacific Legal Foundation is gravely concerned by the action of the court below in overturning a California statute on a rationale more sociological than constitutional. Pacific Legal Foundation is further alarmed by the lower court's misreading of the controlling precedents established by this Court [*Dandridge v. Williams,* 397 U.S. 471 (1970), *Jefferson v. Hackney,* 406 U.S. 535 (1972), *Shapiro v. Thompson,* 394 U.S. 618 (1969), among others] defining equal protection of the laws. Pacific Legal Foundation considers that this case raises fundamental questions concerning judicial powers and functions and the erosion of the principles of judicial restraint and state/federal comity.

Pacific Legal Foundation believes that, possibly because of emphasis on other points, the principles of judicial restraint and state/federal comity were not fully developed in the courts below.

Pursuant to Supreme Court Rule 42, this brief is filed with the written consent of all parties, which consent has been filed with the Clerk of the Court.

ARGUMENT

I

THE EXCLUSION OF MATERNITY BENEFITS FROM DISABILITY INSURANCE COVERAGE IS VALID AND MEETS THE REQUIREMENTS OF EQUAL PROTECTION IN THAT IT HAS A RATIONAL BASIS AND IS FREE FROM INVIDIOUS DISCRIMINATION

The California law under review is one in the area characterized by this Court as the social and economic field. The California Disability Insurance program was enacted by the Legislature "to compensate in *part* [emphasis added] for the wage loss sustained by individuals unemployed because of sickness or injury and to reduce to a minimum the suffering caused by unemployment resulting therefrom." California Unemployment Insurance Code (UIC), Section 2601.

It must be emphasized that the purpose of this disability insurance program is to compensate wage loss only in part. The California Legislature did not believe it to be feasible to provide complete compensation for all disabling circumstances causing wage loss any more than the Legislature believed it feasible to recompense individuals for the total amount of wages lost because of disability.

The Legislature made clear that the general purpose of the disability insurance program is to provide

only partial compensation. This purpose is carried out by a limitation on the amount of payments (UIC 2655), in a limitation of payment duration (UIC 2653), and by the exclusion of pregnancy benefits (UIC 2626).

It is no more unreasonable to provide for partial disability compensation by excluding a high risk category—pregnancy—than it is to provide for an exclusion of payments beyond a specified amount or beyond a specified duration. All three limitations are rational means employed to achieve the same goal of limiting the demand on the disability insurance funds so that the majority of participants in the fund can be maintained at a level of payment acceptable to all. Admittedly these limitations disadvantage particular groups —those whose disability extends beyond the maximum period of eligibility, those whose disability payment is far below their lost wage, and those whose wage loss results from pregnancy. But such disadvantages in a state insurance program do not reach the level of unconstitutional discrimination under the tests established by this Court.

This Court in *Dandridge v. Williams,* 397 U.S. 471 (1970), was asked to hold that a state regulation, in the social and economic field, which resulted in some disparity in grants of welfare payments to the largest AFDC families, violated the Equal Protection Clause. This Court refused to revert to the long past era when the Court thought the Fourteenth Amendment gave it power to strike down state laws "because they may be unwise, improvident, or out of harmony with

a particular school of thought." *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488, as cited in *Dandridge, supra*, at 484. In so doing this Court established the following test:

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical it may be, and unscientific.' *Metropolis Theatre Co. v. City of Chicago*, 208 U.S. 61, 69-70, 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan v. Maryland*, 366 U.S. 420, 426. (397 U.S. at 485.)
>
> "But the Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61. It is enough that the State's action be rationally based and free from invidious discrimination." 397 U.S. at 486-487.

In *Jefferson v. Hackney*, 406 U.S. 535 (1972), the Texas policy of providing a lower percentage of welfare benefits to families with dependent children than was provided to adult recipients was attacked as vio-

lating the Equal Protection Clause. In upholding the Texas policy this Court noted:

"This Court emphasized only recently, in *Dandridge v. Williams,* 397 U.S. 471, 485, 25 L.Ed.2d 491, 501, 90 S.Ct. 1153 (1970), that in 'the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.' A legislature may address a problem 'one step at a time,' or even 'select one phase of one field and apply a remedy there, neglecting the others.' *Williamson v. Lee Optical Co.,* 348 U.S. 483, 489, 99 L.Ed. 563, 573, 75 S.Ct. 461 (1955). So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them.

"The standard of judicial review is not altered because of appellants' unproved allegations of racial discrimination. . . . (406 U.S. 546-547.)

". . . The acceptance of appellants' constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be. Few legislative efforts to deal with the difficult problems posed by current welfare programs could survive such scrutiny, and we do not find it required by the Fourteenth Amendment.

"Applying the traditional standard of review under that amendment, we cannot say that Texas' decision to provide somewhat lower welfare bene-

> fits for AFDC recipients is invidious or irrational. Since budgetary constraints do not allow the payment of the full standard of need for all welfare recipients, the State may have concluded that the aged and infirm are the least able of the categorical grant recipients to bear the hardships of an inadequate standard of living. While different policy judgments are of course possible, it is not irrational for the State to believe that the young are more adaptable than the sick and elderly. . . . Whether or not one agrees with this state determination, there is nothing in the Constitution that forbids it." (406 U.S. 548-549.)

The California law meets the test established by this Court. Although the instant case deals with allegation of sex rather than racial discrimination, the standards applied should not therefore be more rigorous.

The goal of the California State Disability program is to compensate "in part for the wage loss sustained by individuals unemployed because of sickness or injury" (UIC 2601). It does not, and economically cannot, compensate fully for such losses. It is designed to provide best maximum economic protection at an equitable premium to employees. In order to accomplish this objective, the Legislature determined that it was economically necessary to exclude maternity benefits from disability coverage.

The California courts have reviewed and upheld the law now under attack. In the comprehensive opinion in *Clark v. California Employment Stabilization Commission,* 166 Cal.App.2d 326 (1958), the California Court of Appeal discussed in detail the

rationale for excluding maternity benefits from disability insurance coverage:

"... It is a matter of common knowledge that illness or injury arising from pregnancy is classified and excluded from the coverage provided by private contracts of health and accident insurance, in order to effect a premium rate lower than is required in the absence of such an exclusion. It is reasonable to assume that the inclusion of illness or injury caused by pregnancy within the coverage provided by the statute would increase substantially the demands upon the Fund and require a like increase in the contribution rate. As these conclusions are within reason, the inquiry into conditions establishing them is a matter for the Legislature, as is also the determination respecting the relative merits of inclusion or exclusion in comparison with the incident contribution rate. It was properly within the sphere of legislative action to determine whether the objects of the statute in question would be served best by including a disability benefit which reasonably might impose upon the majority of employees a burden disproportionate to contemplated benefits, in order to favor the minority who are included within the classified group. These reasons indicate that the class excluded was not arbitrarily selected, and that the purpose of the exclusion was germane to the legislative object.

"Moreover, to award disability compensation to women employees on account of illness caused by pregnancy, in effect, constituted a maternity benefit plan for a limited group, i.e., women employees. The purpose of the unemployment dis-

ability program is to afford relief to employees sustaining loss of wages on account of illness, and not to confer maternity benefits. To accomplish this purpose the Legislature was entitled legally to adopt such measures as might be necessary to exclude the indirect award of maternity benefits as an incident to the administration of its unemployment disability program. The consequent classification adopted has a substantial relation to the legitimate object thus sought to be accomplished." *Clark, supra,* at 331-332.

The determination made by California that the interests of the community are best served by maintaining a higher rate of benefits at a lower cost by the exclusion of costly maternity benefits is not unreasonable and does not deny equal protection.

II

THE CALIFORNIA DISABILITY INSURANCE LAW IS AN INSURANCE PROGRAM AND MAY VALIDLY EXCLUDE HIGH RISK FACTORS FROM DISABILITY COVERAGE

The California Disability Insurance program was conceived by the Legislature as an insurance program to be operated under insurance concepts. (Mem. Dec. Judge Williams, dissenting at p. 5 and citations at his n. 8). In an insurance program, certain discrimination is inherent in establishing allocation of benefits. But even though legislation may disadvantage a particular group, it does not necessarily deny equal protection of the laws [*James v. Valtierra,* 402 U.S. 137, 142 (1971)]. This is particularly true in the area

of state insurance programs as this Court recognized in *Shapiro v. Thompson,* 394 U.S. 618, 633 and n. 10 (1969).

The law controlling this issue was concisely stated in *Matsuo Yoshida v. Liberty Mutual Insurance Co.,* 240 F.2d 824 (9th Cir. 1957): "'An insurance company has the right to limit the coverage of a policy issued by it and when it has done so, the plain language of the limitation must be respected.'" (quoting *Continental Cas. Co. v. Phoenix Constr. Co.,* 46 Cal.2d 423).

Here the State, acting in the capacity of an insurance company, has limited its coverage by excluding pregnancy benefits. It has expressed this exclusion in the plain language of Section 2626 (UIC): "In no case shall the term 'disability' or 'disabled' include any injury caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter." This exclusion of pregnancy from insurance coverage is a common practice in the insurance industry. "Policies of personal insurance—whether life, accident, health or hospitalization insurance—occasionally contain a specific provision limiting the benefits or excluding coverage in case the event insured against resulted from pregnancy and there is no doubt that such limitation or exclusion provisions are valid and enforceable." (97 A.L.R.2d 1068, 1069).

This Court has itself clearly recognized that the insurer may include in the insurance contract exceptions and exemptions from liability which narrow and

restrict the coverage and are fully binding upon the insured if they are stated without uncertainty or ambiguity. *Bigelow v. Berkshire Life Ins. Co.*, 93 U.S. 918 (1876). As Section 2626 exempts pregnancy from coverage in certain and unambiguous language, the exemption should be upheld.

Alternative insurance to cover appellee's economic loss due to pregnancy is available. Such coverage is more appropriately within the jurisdiction of the legislature or private industry. It does not present a question for judicial resolution.

III

STATE EFFORTS TO LIMIT THE COSTS OF ITS PROGRAMS MUST BE GIVEN DUE CONSIDERATION AND DEFERENCE BY THE COURTS

The determination by California to limit the costs of the disability insurance program by excluding maternity benefits should not be lightly swept aside by the courts. As this Court said in *New York State Department of Social Services, et al. v. Dublino*, ___ U.S. ___, 93 S.Ct. 2507, 2512-2513 (1973), in reversing the lower court's overturning of the New York Work Rules:

> "This is a sweeping step that strikes at the core of state prerogative. . . . It could impair the capacity of the state government to deal effectively with mounting welfare costs and the increasing financial dependency of many of its citizens."

That statement is even more applicable in this case. Indeed to overturn this California law would have catastrophic economic consequences. Such action would distort and disrupt, if not bankrupt, the program.

The effect of the decision below will be to increase the cost to the disability insurance fund by $120.2 million or 30 percent. (Mem. Dec. Judge Williams, dissenting at p. 1, n. 2). As the State fund is operating near capacity already, the effect of these increased costs will threaten the solvency of the fund. In such case, unless the Legislature acts to increase contributions by employees, the alternative is a substantial reduction of benefits (UIC 2604) thereby engendering the increased financial dependency of many California citizens.

This Court wisely observed in *New York State Department of Social Services, et al. v. Dublino,* 93 S.Ct. 2513, that to the extent the New York Work Rules attempted "to cope with the fiscal hardships enveloping many state and local governments, this Court should not lightly interfere. The problems confronting our society in these areas are severe and state governments, in cooperation with the Federal Government, must be allowed considerable latitude in attempting their resolution."

The court below shrugged off the cost factor which prompted the Legislature to adopt the limitation (Mem. Dec. at p. 11) and suggested its own schedule of premiums and maximum contribution rate (Mem. Dec. at p. 12) to replace the amounts fixed by the

California Legislature. Such judicial legislation should not be sustained.

The program at issue is a State disability insurance program. Only the State Legislature has the authority to set the contribution percentage and maximum (UIC 984, 985, 2604). The mere fact that two of the three-judge panel did not agree with the wisdom of the limitations placed upon the insurance coverage by the State Legislature should not render such restrictions unconstitutional.

Indeed such judicial action constitutes an unauthorized limitation upon the rightful independence of state governments, an independence for which the courts must have "scrupulous regard" [*General Motors Corp. v. Blevins,* 199 F.Supp. 381 (DC Colo. 1956)].

IV

CLASSIFICATION INVOLVING SEX IS NOT A DENIAL OF EQUAL PROTECTION SO LONG AS IT HAS A FAIR AND SUBSTANTIAL RELATION TO THE OBJECTIVE OF THE LEGISLATION

The courts have often declared that classifications involving sex are constitutionally valid. *Schattman v. Texas Employment Commission,* 459 F.2d 32 (5th Cir. 1972) at 40, 41, cites a long list of cases upholding legislative classification based on sex.

The application of equal protection to sexual classification was placed in precise perspective by this Court in *Reed v. Reed,* 404 U.S. 71, 75-76 (1971):

> "In applying that clause [Equal Protection] this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. [Citations omitted]. The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike [citation omitted]."

The key issue is whether the California Legislature's exclusion of maternity benefits from State Disability Insurance coverage is reasonable and premised upon some ground of difference which has a fair and substantial relation to the objective of the statute.

The two cases dealing with this type of governmental insurance program both upheld classifications involving sex. In *Clark v. California Employment Stabilization Commission,* 166 Cal.App.2d 326, already discussed, the California Court of Appeal upheld the statute in issue as creating a classification reasonably designed to achieve the objectives of the legislation.

In *Gruenwald v. Gardner,* 390 F.2d 591 (2nd Cir. 1968), *cert. denied,* 393 U.S. 913, a male unsuccessfully attacked those provisions of the Social Security Act establishing different criteria for men and women

for computation of social security benefits at age 62. The criteria provided a lower percentage of benefits for men than for women. In upholding the Social Security classification, the court in *Gruenwald* noted that the two sexes are not fungible, citing *Ballard v. United States,* 329 U.S. 187, 193 (1946) and found:

> ". . . [A] reasonable relationship between the objective sought by the classification, which is to reduce the disparity between the economic and physical capabilities of a man and a woman—and the means used to achieve that objective in affording to women more favorable benefit computations. There is, moreover, nothing arbitrary or unreasonable about the application of the principle underlying the statutory differences in the computations for men and women. Notwithstanding the favorable treatment granted to women in computing their benefits, the average monthly payments to men retiring at age 62 still exceeds those awarded women retiring at that age.
>
> ". . . [T]he trend of authority makes it clear that the variation in amounts of retirement benefits based upon differences in the attributes of men and women is constitutionally valid." 390 F.2d at 592-593.

The circumstances in *Gruenwald* were compellingly similar to those presently before the Court except that the roles of the sexes were reversed. In *Gruenwald,* the males still managed on the average to obtain payments exceeding those of females notwithstanding the computational discrimination. And in the instant case, the women manage to obtain 38 percent of the benefits while making only 28 percent of the contribu-

tions. To put it in dollars and cents, women obtain benefits of $1.37 for every dollar they pay while men receive only $0.89 for each dollar. (Mem. Dec. Judge Williams, dissenting at p. 1, n. 1). The inclusion of maternity benefits in the disability insurance program would increase this disparity substantially. Thus the rationale in *Gruenwald* is directly applicable to the case at bar.

This Court has in the past noted that state insurance programs may make classifications. Indeed, *Shapiro v. Thompson,* 394 U.S. 618 (1969) which was heavily relied on by the court below (Mem. Dec., pp. 6, 11, 14) specifically exempts such insurance programs from the rationale of the opinion for Footnote 10 reads:

> "We are not dealing here with state insurance programs which may legitimately tie the amount of benefits to the individual's contributions." 394 U.S. at 632-633.

V

SECTION 2626 DOES NOT DISCRIMINATE AGAINST WOMEN

Appellees are completely in error when they claim that denial of pregnancy disability benefits constitutes a denial of equal protection because it is based solely on sex. This classification is as burdensome on the male of the species. Most of the pregnant members of the work force have husbands who are in some degree dependent upon the income of the wife to maintain the family standard of living. Thus the denial of pregnancy benefits is not solely a denial of payment to the woman, it is a denial of payment to the family budget shared by both wife and husband. Once this is recognized, the absurdity of appellees' claim of unconstitutional discrimination on the basis of sex is obvious. The exclusion from state insurance coverage falls just as heavily upon the husband as upon the wife because the loss of income sustained thereby is suffered by the entire family unit and not merely by the wife.

Appellees may attempt to counter this contention by arguing that not all pregnant women are married and that the exclusion of pregnancy from disability insurance will fall most heavily on the unwed pregnant woman. California, however, as a part of its balanced social and economic plan, makes provision for support of needy pregnant women, wed or unwed, in its Aid to Families with Dependent Children program. (California Department of Social Welfare Manual of Policies and Procedures 44-213.3 Appendix).

The situation here is analogous to that in *Dandridge* in which this Court reversed the lower court's voiding of the Maryland method of limiting AFDC grants to large families, stating: "Given Maryland's finite resources, its choice is to support some families adequately and others less adequately, or not to give sufficient support to any family." *Dandridge, supra,* at 479.

Like Maryland, California and its work force whose contributions sustain the State Disability Insurance Fund have limited resources. Unless those resources (employee contributions) are increased, the level of benefits must be decreased (UIC 2604) to a point inadequate to support any family. California has made its choice: To support families suffering a disability other than pregnancy through an adequate level of State Disability Insurance benefits and to support other needy families (including unwed pregnant women with no other children), whose inability to make a living stems from pregnancy, through AFDC.

Whether or not this balance achieved by exclusion of pregnancy benefits from State Disability Insurance was the wisest method the California Legislature could have conceived to optimize benefits to the community should not be in issue. This Court in *Jefferson,* 406 U.S. at 551, recently reemphasized the rationale of *Dandridge*:

> "We do not decide today that the [state law] is wise, that it best fulfills the relevant social and economic objectives that [the State] might

> ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. . . . [T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."

It is precisely this action of the court below, in second-guessing the California Legislature's allocation of State Disability Insurance benefits, which constitutes the basis of *amicus curiae's* interest in this case.

CONCLUSION

The court below has misconstrued its proper role in our system of a federal government. It has failed to understand that a statute of a state is not to be overturned lightly and without consideration of the implications thereof. To let this decision stand will be an invitation to other courts to create new social and economic laws without benefit of the normal balancing factors inherent in the legislative process. Unless corrected by this Court, the lower court decision will have immediate and long-range disruptive effect upon the political, social, and economic well-being of

the people of California. For this reason, Pacific Legal Foundation, as *amicus curiae,* urges that the decision of the court below be reversed.

Respectfully submitted,

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January 1974

(Appendix Follows)

THE FAMILY BUDGET UNIT 44-213

General Provisions

.11 To be eligible for AFDC, a child who is not in foster care must be living with at least one of the relatives specified in Section 44-213.21 in a place of residence maintained as his or their home.

The amount of aid for AFDC family groups shall be computed in accordance with Section 44-212 for the number of persons included in the family budget unit (see Section 44-213.3 and 44-213.4).

.12 For summary charts, see "Forms Appendix," Form CA 241, AFDC Budget Work Sheet.

Definitions

.21 The term "relative" means the following:

a. Father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, first cousin once removed, nephew, niece, half-brother, half-sister, or any such person of preceding generation denoted by prefix of grand, great or great-great.

b. Any person who legally adopted the child or adopted the child's parent, or the natural children or other adopted children of such person.

c. Legally married spouse of any person named above, even though the marriage has been terminated by death or divorce.

.22 The term "living with" shall include persons who would be physically in the home except for circumstances:

.221 That require temporary absence, such as hospitalization, attendance at school, visiting, vacationing, moving to another community, trips made in connection with current or prospective employment, active duty in the armed services, and similar situations, or

.222 That require granting assistance to the relative up to thirty days prior to the child's arrival in the relative's home from placement in a foster family home or institution.

.23 The term "needy person," as used in the following sections, means a person who has no income or who has net income (see Section 44-113.23) that is less than the amount of the AFDC basic standard plus special need, as specified in Sections 44-212 and 44-355, respectively.

44-213 THE FAMILY BUDGET UNIT (Continued) 44-213

ASC .3 Ready Persons Living in The Home Who Shall Be Included As "Resident" in The Basic Family Budget Unit Under EXCEPTION By Section 44-213.4

.31 Children – all related eligible unmarried children, including the unborn child, for whom aid is requested by the child's parent or relative caretaker.

.32 Parent – the eligible child's natural or adoptive parent who requests aid on behalf of the child,

and

.33 Parent's Spouse – The spouse of the eligible child's natural or adoptive parent when the basis for deprivation is the incapacity of a natural or adoptive parent, or the unemployment of the natural or adoptive father (who meets federal conditions in Section 41-440.5), living in the home,

or

.34 Relative – If there is no parent living in the home, the ready adult relative, as defined above, who provides care and supervision of the eligible child.

A Other Ready Related Persons Living in the Home Who May Be Included As "Nonresidents" in The Basic Family Budget Unit With Eligible Children, Under EXCEPTION By Section 44-213.5 for Purpose of Determining Financial Eligibility under Chapter 40-100.

.41 Upon the written request of the parent, or the caretaker if neither parent is living in the home, the following persons living in the home, if ready, shall be members of the Family Budget Unit and shall have their needs and income taken into consideration in determining the financial eligibility of the family.

.411 Unmarried brothers and sisters of the eligible child, including half- or stepbrothers and stepsisters.

.412 The eligible child's stepparent, when the child is deprived by the absence or death of a natural or adoptive parent.

.413 The eligible child's other unmarried parent.

.414 An adult relative, as defined in Section 44-213.21, other than the parent's spouse, whose presence is required to provide care and supervision that cannot be given the eligible child by the only parent living in the home due to the parent's incapacity.

.42 Persons included in the Family Budget Unit under provisions of Section 44-213.41 for purpose of determination of financial eligibility shall not be included in the Family Budget Unit for purposes of grant computation.

44-213 THE FAMILY BUDGET UNIT (Continued) 44-213

AFDC .3 Exclusions

Persons specified in Sections 44-213.3 and 44-213.4 shall be excluded from the family budget unit under the following circumstances:

.31 Exclude a person who receives OAS, AB, APSB or ATD.

.32 Exclude a child, and the child's parent, when the child's eligibility depends on the action of the parent, and the parent refuses to cooperate in determining eligibility or with law enforcement officials (for limitations, see Section 43-119).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-640

DWIGHT GEDULDIG, *Appellant,*

v.

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Consolidated Cases on Appeal from the United States District Court for the Northern District of California

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF APPELLANT

With consent of the parties, the National Association of Manufacturers of the United States of America respectfully submits this brief as *amicus curiae* in support of the appellant.

INTEREST OF THE AMICUS CURIAE

The National Association of Manufacturers (NAM) is a non-profit voluntary business association, organized as a membership corporation under the laws of the State of New York. It is composed of manufacturing and related concerns of all sizes located throughout the United States and represents a substantial portion of the nation's industrial employment. Most of its members have maternity leave policies and may, therefore, be directly affected by the Court's decision in this case.

The NAM also has an interest in this case because it involves a basic constitutional issue under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution which requires resolution and clarification by this Court. The decision below, if left standing, will have far reaching effects on labor-management relations because a substantial number of members have collective bargaining agreements which contain provisions requiring payment of fringe benefits including health and disability benefits. In addition, NAM members are subject to the provisions of Title VII of the Civil Rights Act. The decision in this case may affect the Sex Guidelines of the Equal Employment Opportunity Commission which require that pregnancies be treated the same as disabilities caused by sickness or disease. Thus the ramifications of this decision will affect basic labor management relations and policies.

Accordingly, the NAM has a proper interest in the resolution of the issues before the Court in this case.

ARGUMENT

I. There is a Rational Basis for Excluding Pregnancy from Health Insurance Benefits and that is the Proper Test to Use in Determining the Constitutionality of the Statute

In determining the constitutionality of a statute under the Equal Protection Clause of the Fourteenth Amendment this Court has used two different tests.

In the first test, the statute is subject to "strict scrutiny" and will be held invalid unless there is a "compelling" interest to be protected. This test is used where the statute involves a "fundamental" interest or if it is based on a suspect classification. See *Shapiro* v. *Thompson,* 394 U.S. 618, 627 (1969); *Graham* v. *Richardson,* 403 U.S. 365, 372 (1971).

In the other test a statute is valid unless it is without "rational basis." See *Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970).

In recent decisions of this Court involving sex discrimination, *Cleveland Board of Education* v. *LaFleur,* — U.S. — (decided January 21, 1974), *Frontiero* v. *Richardson,* 411 U.S. 677 (1973), and *Reed* v. *Reed,* 404 U.S. 71 (1971), the stricter test used in the *Graham* and *Shapiro* cases was not applied. Instead, this Court examined the facts of each case to determine whether there was a "rational basis" for the classification. As this Court stated in *Reed* v. *Reed,* supra, p. 76: "The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of §§ 15-312 and 15-314." Accordingly, the application of the statute involved in the present case

will be examined to show that the exclusion of women on maternity leave has a "rational relationship" to lawful objectives.

2. The EEOC Guidelines Relating to Pregnancy Are Not Entitled to Judicial Deference

It is anticipated that the EEOC's Guidelines relating to the treatment of pregnancy will be used as a basis for the contention that there is no "rational basis" for the statute. The Guidelines provide, 29 C.F.R. § 1604.10:

> "(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities."

It is submitted that this pronouncement by the EEOC is entitled to little or no weight because the Guideline does not meet the criteria established by this Court in *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944) to be applied to agency interpretations of statutes. That case dealt with The Fair Labor Standards Act of 1938 which set a minimum wage, provided for overtime pay and regulated other employment conditions. An Ad-

ministrator was empowered to bring suits in federal courts to enforce the Act. The Administrator published "interpretive bulletins" to provide a practical guide to employers and employees as to how the Act would be applied. The lower court applied a rule contained in an interpretive bulletin to the facts of the case before it without analyzing the rule. This Court reversed that decision and meticulously stated the criteria to be applied to agency interpretations of statutes:

> "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." (page 140).

The Sex Guidelines issued by the EEOC stand on the same footing as the interpretive bulletins considered in the *Skidmore* case and the same standard should be applied to them. The Civil Rights Act was enacted July 2, 1964 with an effective date of July 2, 1965. On November 15, 1966 the EEOC General Counsel sent the following letter:

> "Gentlemen:
>
> You state that under your collective bargaining agreement male and female employees are granted sick leave with pay. Female employees, however, are granted maternity leaves without pay; although their services are not terminated. You inquire

whether this policy is in compliance with Title VII of the Civil Rights Act of 1964.

The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees. Accordingly, we believe that to provide substantial equality of employment opportunity for both sexes, there must be special recognition for absence due to pregnancy, and for this reason have stated that, generally speaking, a leave of absence should be granted for pregnancy whether or not it is granted for illness. On the other hand, we do not believe that an employer must provide the same fringe benefits for pregnancy as he provides for illness, and, consequently, it is our view that the policy you describe is not in violation of Title VII.

Sincerely yours,

CHARLES T. DUNCAN
General Counsel"

This remained the consistent position of the agency until April 5, 1972, the effective date of the present Sex Guidelines. Therefore, the present Guidelines are not a "contemporaneous construction" and there has been no consistent interpretation of the statute by the agency. The General Counsel's opinion letter quoted above is the interpretation which meets the *Skidmore* criteria.

This Court has stated that where the administration of a statute has not been uniform, an agency interpretation is not entitled to the highest respect or weight. In such a case the agency interpretation will be con-

sidered only to the extent that it is supported by valid reasons. *Burnet* v. *Chicago Portrait Co.*, 285 U.S. 1 (1932); *Alexander V. Cosden Pipe Line Co.*, 290 U.S. 484 (1934). It is submitted that the reasons stated in the balance of the brief constitute a sufficient basis to uphold the constitutionality of the challenged statute.

2. Medical Evidence Demonstrates the Uniqueness of a Disability Caused by Pregnancy and This Justifies Special Treatment

The basic purpose of the California Disability Insurance Plan is to provide compensation to employees when they are disabled due to a non-job related illness or injury. Although all pregnant women experience some period of disability as the result of their pregnancy, this disability is not due to illness or injury in the vast majority of cases. One authority, Dr. John C. Donovan, testified that:

> "A I think I've testified that pregnancy per se is a normal physiologic event, that it remains normal, excluding spontaneous inevitable abortions, it remains normal somewhere around eighty to eighty-five percent of instances, that in about fifteen to twenty percent of instances the pregnancy is abnormal, that the abnormality may stem from some complication inherent in the pregnancy or the abnormality may be the result of the inner action between the lowered reserves of the woman and normal demands of the pregnancy, that by no means all of these fifteen to twenty percent of abnormal pregnancies is the patient clinically disabled with respect to usual activities.
>
> * * *
>
> Q This testimony that you have given today, is this just your own personal opinion or is this generally accepted medical opinion?

A I think I can say quite authoritatively that it is generally accepted medical opinion.[1]

Dr. Donovan also testified that the length of time women are advised to remain at home after the first seven to ten days following delivery is, for the most part, due to sociological reasons. He testified:

"I responded to your question because you said medically or clinically with the period of seven to ten days. This added three, four, five weeks, see, the doctor is wearing two hats. One hat says how long the patient is at risk or is really disabled. The other hat says, has to do with the new family unit and the mother establishing a familiarity with a knowledge of the baby and vice versa and I think the added three or four weeks generally takes in if we really dissect the reasons for it, generally taking into account this perfectly needed adaptive device in most —

Q This additional period of time of four weeks or so is really a period of time to allow the mother to adapt to the child and vice versa?

A Yes.[2]

Later Dr. Donovan explained what he meant by clinically disabled:

"By clinically disabled I have reference to the fact that she was, during this period of time, at

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[1] Testimony of Dr. John C. Donovan acting chairman of the Department of Obstetrics and Gynecology of Strong Memorial Hospital and Professor of Obstetrics and Gynecology at the University of Rochester School of Medicine, in *Franklin et al. v. Stromberg Carlson Corp. and I.U.E. Local No. 338*, Case No. CS-27069-72 et al. before the state of New York, Executive Department, State Division of Human Rights, April 18 and July 10, 1973, pp. 120-122.

[2] *Ibid.*, pp. 118-119.

risk. In that during this period of ten to twelve days there was perhaps a continuing risk of infection in the genital area. There would be a risk of hemorrhage, uterine hemorrhage. There would be a risk of thrombosis of the veins, particularly of the leg. None of these risks statistically would be as great as they would be immediately after delivery and they are decreasing almost expeditiously, very, very markedly decreasing. That's why I say ten-twelve days was conservative. Mainly she's at risk, that's what I meant by clinically."[2]

Thus the "disability" after pregnancy is more for sociological than for medical reasons. The same sociological factors are present before delivery and constitute sufficient reason to excuse women from work during that period as the following testimony demonstrates:

Q. What I understand from your testimony that such a woman could work right up to her beginning labor from a medical standpoint?

A. Medical standpoint—normal patient, medically normal patient, normal pregnancy, there is no medical reason [why] they cannot work until the onset of labor. Again, assuming the job requirements are compatible with a term abdomen.

Q. You testified that you have your own patients as well as your work at the University and the hospital. You have your own private patients?

A. That's correct.

Q. In your experience, Doctor, have all your patients worked right up to the time of delivery or labor?

A. Some. Certainly not all.

Q. And for those who haven't, why have they stopped working sooner?

A. Some would ask — many would just stop working and not bringing it to my attention in

[2] *Ibid*, pp. 594-595.

terms of an excuse, et cetera. Others would want an excuse to stop working because they felt certain preparations had to be made and buy a layette and things of that nature. They didn't feel like working. Their attentions were not so interested in the job any more. Others had mild physical symptoms. They did not feel like working.

Q. In those cases where they have asked for something in writing from you, have you given it to them?

A. Yes.

Q. Would I understand if we're looking at it strictly from a medical standpoint, medically they could continue to work?

A. Yes. If I may attempt to clarify that current contradiction, one point is that the excuse I would usually write would be that the patient should be excused from working. In other words, I'm saying she should not be made to work.

Q. However, medically such a person would not have an illness or sickness?

A. Correct. I don't think I would write an excuse saying she could not work."[4]

Based upon the expert testimony reviewed above it seems evident that the disabilities arising from pregnancy are not the same that would arise from an illness or injury. Thus much of the time women remain at home is for sociological rather than for physical reasons. Because of this, the exclusion of pregnancy from the disability insurance program has a rational relationship to the purpose of the legislation.

4. The Provisions of the Health Insurance Plan Which Exclude Maternity Benefits Are Not Discriminatory

Discrimination is different treatment of individuals under the same or similar circumstances. Legislation

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[4] *Ibid.*, pp. 600-602.

in this area and decisions of courts are based upon the premise that all people are created equal. Where a race or a sex is treated differently because of antiquated stereotypes there is unlawful discrimination. Acting upon that premise this Court has held that a provision of the Idaho Probate Code which gave preference to men over women in applying for letters of administration violated the Equal Protection Clause of the Fourteenth Amendment. See *Reed* v. *Reed,* 404 U.S. 71 (1971). Similarly state "protective" statutes which limited the weight a woman could lift on her job have been found unlawful because they prevented some women with ability from performing those jobs. See *Weeks* v. *Southern Bell Telephone & Telegraph Co.,* 408 F. 2d 228 (5th Cir. 1969); *Rosenfeld* v. *Southern Pacific Co.,* 444 F.2d 1219 (9th Cir. 1971); *Jones Metal Products Co.* v. *Walker,* 25 Ohio App. 2d 141 (1971). Billy Jean King has shown us that sex stereotypes are not accurate. There are always exceptions and that exceptional person may not be penalized because most persons in the class would not be qualified.

This disparate treatment has also been held unlawful where men were excluded from jobs because of their sex. For example, it has been held that an airline policy of hiring females exclusively for the position of flight attendant was unlawful because men could give courteous, personalized service during flights as well as women. See *Diaz* v. *Pan American World Airways, Inc.,* 442 F. 2d 385 (5th Cir. 1971), cert. denied 404 U.S. 950.

In *Willingham* v. *Macon Telegraph Publishing Co.,* 482 F. 2d 535 (5th Cir. 1973) the Court considered whether the refusal to hire a male because he had long

hair was discrimination based on sex. The Court stated, page 428, that "a grooming code requiring different hair lengths for male and female job applicants discriminates on the basis of sex within the meaning of Section 703 [of the Civil Rights Act of 1964]. Such a code treats applicants differently because of a sex stereotype: only males are prohibited from wearing their hair long. Section 703 does not permit one standard for men and another for women where both are similarly situated."

Laws and business practices were condemned in the above cases because they denied opportunity to a whole group based on an inaccurate stereotype. The NAM subscribes to the rationale used in those cases. However, the above-cited cases do not resolve the issue presented to the Court in the present case. Here we are concerned with a physical difference between men and women. Men cannot bear children. This is a physical difference between the sexes. There is no stereotype, prejudice or male chauvinism involved in the present case. We are concerned with a unique condition of women. Pregnancy cannot be equated to disabilities caused by sickness or disease because pregnancy is not a sickness or disease. Pregnancy is a condition unique to women and employers should be free to treat it as such. Women cannot be placed at a comparative disadvantage vis-à-vis men by such treatment because there is nothing to compare to men. Unique conditions may require special treatment and that should not be considered unlawful discrimination. As long as a woman is permitted to return to her job after pregnancy she is not placed at any competitive disadvantage with men. The law should require no more.

5. The Increased Cost of the Insurance Program Affords a Reasonable Basis Upon Which to Deny Benefits for Pregnancy

This case involves the California Disability Insurance Program which is attacked for the failure to treat pregnancy as a disability. The Disability Insurance Program, together with Workmen's Compensation Insurance and Unemployment Insurance constitute the insurance program of the State of California in which benefits are provided for employees. The Disability Insurance Program was designed to provide compensation to employees who became unemployed due to non-job related illnesses or injuries. This plan is financed by a one percent employee contribution. The amount of the employee contribution has remained the same since the inception of the program in 1946. Coverage has been expanded over the years as funds permitted. This history of the plan is reviewed in detail by Judge Williams in his dissenting opinion (Appellant's Jurisdictional Statement, Appendix pp. 21-26). The statistics regarding the operation of the plan show that women receive $1.37 for each dollar contributed, and men receive only $0.89 for each dollar contributed. To add pregnancy to the covered disabilities would increase the cost of the plan 30 percent (Judge Williams' opinion, Appellant's Appendix, p. 19, footnotes 1 and 2). This would necessitate raising the contribution rate or restricting benefits. Such a change, however, would frustrate the valid legislative purpose of providing the broadest coverage possible while limiting the employee contribution to one percent. Parties should be free to design an insurance program and limit benefits where necessary to accomplish its valid objectives.

The effect of the lower court's decision would be to substantially increase the cost of this and countless

other health plans throughout the country. It would encourage women to make planned use of the program by securing employment shortly before they contemplated bearing children. This type of planning is not possible with other disabilities and it could easily place substantial additional financial burdens on insurance programs. This Court has held that classifications based upon economic consideration are valid. *O'German & Young* v. *Hartford Ins. Co.*, 282 U.S. 251 (1930) and *Borden's Co.* v. *Baldwin*, 293 U.S. 194 (1934). Therefore, from a practical viewpoint there is a reasonable basis for the exclusion of pregnancy in the benefits covered.

CONCLUSION

It is respectfully submitted that based upon the unique nature of pregnancy, the fact that it does not involve competition with men, the medical evidence showing the sociological nature of the disability, and economic factors, there is a rational basis for treating a disability caused by pregnancy differently from a disability caused by sickness or disease. Therefore, such an insurance plan should not violate the Equal Protection Clause of the Fourteenth Amendment and the decision of the lower court should be reversed.

Respectfully submitted,

NATIONAL ASSOCIATION OF MANUFACTURERS
OF THE UNITED STATES OF AMERICA

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February, 1974

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-640

DWIGHT GEDULDIG, *Appellant*,

v.

CAROLYN AIELLO,
Individually and on Behalf of
All Others Similarly Situated, *Appellees*.

DWIGHT GEDULDIG, *Appellant*,

v.

AUGUSTINA D. ARMENDARIZ, ET AL.,
Individually and on Behalf of All
Other Women Similarly Situated, *Appellees*.

Consolidated Cases on Appeal from the United States District Court for the Northern District of California

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BRIEF OF THE AMERICAN TELEPHONE AND TELEGRAPH COMPANY AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE[1]

The American Telephone and Telegraph Company, together with the Associated Bell Companies (herein-

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[1] This brief is filed pursuant to Supreme Court Rule 42(2). Written consent of Appellant and Appellees has been obtained and filed with the Clerk of the Court.

after, Bell System Companies), is the largest private employer in the nation, and almost 50 percent of its employees are women. The Bell System Companies are employers subject to the requirements of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*, and are federal contractors subject to the requirements of Executive Order 11246, as amended by Excutive Order 11375. Both Title VII and the Executive Order prohibit employment discrimination on the basis of sex.

In connection with employment, Bell System Companies maintain disability programs which provide wage continuation benefits for employees disabled to work because of sickness or accident. While all these plans provide benefits for disability absences resulting from pregnancy complications and abnormal pregnancies, none provides wage continuation benefits for absences attributable to *normal* pregnancy and childbirth.[2]

In 1972 the Equal Employment Opportunity Commission (EEOC) revised its Sex Discrimination Guidelines, so that for the first time they interpreted Title VII as requiring that normal pregnancy be treated as a temporary disability "under any health or temporary disability insurance or sick leave plan available in connection with employment." 29 C.F.R. § 1604.10(b). Recently suits have been brought by

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[2] Each Bell System Company provides periods of uncompensated leave for pregnancy and childbearing whose length is determined on a case-by-case basis. The time of beginning and ending maternity leave is basically determined by the individual employee on the advice of her doctor.

private parties against six Bell System Companies,[3] as well as other private employers,[4] alleging that the failure to provide sickness and accident disability benefits for normal pregnancy violates Title VII. The resolution of the present case will undoubtedly have a substantial effect on the cases pending against private employers under Title VII.[5]

The impact of the decision in the present case on private employers was made even more direct by a recent announcement from the Office of Federal Contract Compliance (OFCC), which administers and enforces the Executive Order program. On December 27, 1973, OFCC invited public comments on proposed revisions to its Sex Discrimination Guidelines. 38

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[3] CWA v. Illinois Bell Tel. Co., No. 73-C-959 (N.D. Ill., Filed April 13, 1973); CWA v. Southern Bell Tel. & Tel., No. 18328 (N.D. Ga., Filed May 17, 1973); CWA v. AT&T Long Lines Department, C.A. No. 73-3353 (S.D.N.Y., Filed July 31, 1973); CWA v. New York Tel. Co., C.A. No. 73-3352 (S.D.N.Y., Filed July 31, 1973); CWA v. The Pacific Tel. & Tel. Co., C.A. No. C-73-1739 RFP (N.D. Cal., Filed Sept. 28, 1973); and CWA v. South Central Bell Tel. Co., C.A. No. 73-1771 Section A (E.D. La., Filed July 5, 1973).

[4] *E.g.*, Grogg v. General Motors Corp., 73 Civ. No. 63 (KTD) (S.D.N.Y., Filed Jan. 4, 1973); Gilbert v. General Electric Co., No. 142-72-R (E.D. Va., Filed Mar. 15, 1972). To date there are two conflicting district court decisions on the issue: *Compare* Newmon v. Delta Air Lines, Inc., — F. Supp. — (N.D. Ga. 1973), Daily Labor Report No. 18 at F-1 (Jan. 25, 1974), *with* Wetzel v. Liberty Mutual Insurance Co., — F. Supp. — (W.D. Pa. 1974), Daily Labor Report No. 15 at D-1 (Jan. 22, 1974).

[5] Now that Title VII has been made applicable to the employment practices of state and local governments by the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103 (March 24, 1972), the need for consistency in the principles applicable to public and private employers is particularly apperent. *See* Cleveland Bd. of Educ. v. La Fleur, — U.S. —, 42 U.S.L.W. 4186, 6 FEP Cases 1253, 1256 n.8 (January 21, 1974).

Fed. Reg. 35336-35338. Among the changes under consideration is a provision which would require federal contractors to provide sickness and accident disability benefits for absences from work due to normal pregnancy.[6] The notice which solicited comments on this proposal explained that OFCC was reconsidering "some unsettled questions regarding leave on account of the condition of pregnancy which are presently being subjected to judicial scrutiny," and specifically noted that:

> The OFCC, however, recognizes the need to continue to be guided by pertinent judicial decisions, including those expected to be rendered by the United States Supreme Court during this present term. 38 Fed. Reg. at 35337.

Thus, the Court's resolution of the present case may well determine whether OFCC adopts its proposed guideline requiring disability pay for pregnancy. It is important to emphasize that unlike EEOC's Guidelines, which do not have independent force or effect,[7] the OFCC Guidelines constitute an order to federal contractors. A failure to comply with their requirements can result in ineligibility for government contracts.[8]

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[6] This would constitute a reversal of OFCC's present position that, "There is no requirement that an employee be paid during absence [for maternity leave]." Memorandum of John L. Wilks, Director, OFCC, to Agency Heads (Nov. 12, 1970) at 5.

[7] American Newspaper Publishers Ass'n v. Alexander, 294 F. Supp. 1101, 1103 (D.D.C. 1968). *See* Espinoza v. Farah Mfg. Co., 94 S. Ct. 334 (1973).

[8] 41 C.F.R. § 60-2.2; Contractors Ass'n of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971); Edgely Air Products, Inc., HEW Docket No. CC-1, CCH Empl. Prac. Guide ¶ 2774.20 (March 23, 1971).

In testimony before the Joint Economic Committee of Congress on the "Economic Problems of Women" on July 11, 1973, Mr.

INTRODUCTION

The Bell System Companies have been concerned with the question before the Court since the promulgation of the revised EEOC Guidelines. This concern was sharpened by the filing of six law suits challenging Bell System sickness and accident disability programs, and by OFCC's proposal to revise its Sex Discrimination Guidelines. Therefore, the Bell System Companies have had occasion to review the operation of these programs and to collect and collate extensive data regarding the present treatment of men and women under such programs; the cost and benefit impact of adding coverage for normal pregnancy; and the comparative, employment-related characteristics of maternity leaves and disability absences. Since this data relates to a very large number of employees,[9] almost half of whom are women,[10] working throughout

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George Travers, Assoc. Dir., Plans, Policies & Programs of OFCC, was asked to explain the conflict regarding maternity benefits between the OFCC Guidelines and those of EEOC. He stated that the issue was under study and then noted:

> "One of the serious questions that has arisen about our proposed revisions to the guidelines is that unlike the EEOC guidelines, our regulations would be an order to government contractors. Many of the employers are now waiting on pending suits over the guidelines to settle the questions. So that a legal question has been raised about whether or not we should order government contractors to conform to the EEOC guidelines, knowing that there are legal questions being raised."

Report of Proceedings, Vol. 2 at pp. 126-127.

[9] Bell System Companies had approximately 894,505 employees eligible for benefits in fiscal year 1970-1971, and approximately 955,752 eligible employees in fiscal year 1971-1972.

[10] Women constituted approximately 48.57% of the eligible work force in 1970-1971, and approximately 48.29% of the eligible work force in 1971-1972.

the United States, it is a reliable "sample" of evidence relevant to the issues in this proceeding.

It is of particular concern to the Bell System Companies that a good deal of the debate, and even some of the legal decisions, on the issue of mandatory maternity benefits, has proceeded in a conclusory fashion, either ignoring, or professing ignorance of, important matters of fact. For example, the EEOC reversed its long-standing interpretation on the question,[11] without any statistical analysis or reference to medical opinion.[12] Even where some information has been available, the analyses often have been based on erroneous assumptions. This is exemplified by the recent decision in *Wetzel* v. *Liberty Mutual Insurance Co.*, — F.Supp. — (W.D. Pa. 1974), Daily Labor Report No. 15 at D-1 (January 22, 1974), where the district court supported its conclusion that Title VII required that disability benefits be paid for normal pregnancy, by comparing pregnancy to the predominately male condition of "gout." Moreover, the court rejected employer justifications based on cost with the following unsupported and unsupportable conclusions:

> We may assume from a general knowledge of the conditions of life, that in the normal or usual pregnancy, the period of disability will be relatively short. There is nothing in this record to

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[11] The history of EEOC's change in interpretation, as well as the reasons why its current guideline should not be followed, is discussed in the respective amicus curiae briefs of The Chamber of Commerce of the United States of America and General Electric Company, filed in support of the Jurisdictional Statement.

[12] *See* deposition of Sonia Fuentes, former Chief of EEOC's Legislative Counsel Division, quoted in the amicus curiae brief of Delta Air Lines filed in *Cleveland Bd. of Educ.* v. *La Fleur*, supra at Appendix, 44-52.

> show, and *nothing in our general experience with life indicates that the job-related incidence of disability for pregnancy is any greater or any less than that for prostatectomy.* (Emphasis added.)

The Argument which follows, based on the actual experiences of Bell System Companies, shows that this factual assumption is dramatically erroneous.[13] Of most direct concern for the present case, the court below professed an inability to properly evaluate the comparative cost implications of covering normal pregnancy under the California disability insurance program, since, "no statistics are available indicating the cost to the program of paying benefits on account of various disabilities presently covered." *Aiello* v. *Hansen*, 359 F.Supp. 792, 798 (N.D. Cal. 1973).

In an effort to prevent further decision on these important questions from being made in a factual vacuum, the Bell System Companies responded to OFCC's request for public comments on the proposed revisions to its Sex Discrimination Guidelines by submitting a summary of pertinent data regarding the operation of their sickness and accident disability programs. Because the Court's resolution of the present case will undoubtedly influence both the determination by OFCC and the outcome of pending cases under Title VII, these public comments are attached as an appendix to this brief.[14] The Argument which follows highlights the findings in that data and is offered

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[13] *See infra* note 17 & text and *infra* note 28.

[14] This information should be especially pertinent to the present case since Bell System disability programs, like the California Unemployment Insurance Code as presently constituted, include benefits for complicated and abnormal pregnancies but do not provide benefits for normal pregnancies.

to the Court to assist it in assuring that this important legal determination, which will have a massive impact on both public and private employers, will not be based on erroneous factual assumptions.

ARGUMENT

I. Women Receive a Disproportionate Advantage Under Existing Disability Plans Even Where Benefits for Normal Pregnancy Are Not Provided

The present distribution of benefits between men and women under the sickness and accident disability plans of the Bell System Companies confirms the experience of the California Unemployment Insurance Code.[15] Even without considering absences relating to normal pregnancy, women have a greater frequency rate (number of disabilities), and severity rate (duration of disabilities) than men. In fiscal years 1970-1971 and 1971-1972, women had a higher frequency of disabilities and lost more total days from work in sixteen of the seventeen disability group classifications.[16] In 1970-1971, women accounted for 64.65% of the total days for which benefits were paid, even though they were only 48.57% of the total work force eligible for benefits. Similarly, in 1971-1972, women received compensation for 63.45% of the total benefit days

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[15] In his dissenting opinion Judge Williams noted:

> Women contribute only 28% of withholdings but draw 38% of the benefit payments. Put another way, men receive $.89 per dollar contributed while women receive $1.37 per dollar contributed.

Aiello v. Hansen, 359 F. Supp. at 802 n.1.

[16] The one exception in both periods is "Diseases of circulatory system" (Group 7), which includes heart attacks and other cardiac problems.

though representing only 48.29% of employees eligible for benefits.

The seventeen disability group classifications, with the exceptions of "Complications of pregnancy, childbirth and puerperium" (Group 11), and "Perinatal morbidity and mortality" (Group 15), contain comparable conditions, including some conditions which are unique to one sex. Thus, while prostate trouble [17] may be unique to males, when considered with other "Diseases of the genitourinary system" (Group 10), women have a considerably higher frequency rate and dramatically greater number of total days lost. [18] Likewise "gout," which *Wetzel* cited as a predominately male condition, is classified among "Endoctrine, nutritional and metabolic diseases" (Group 3), with women again having a higher frequency rate and number of total days lost.[19]

II. Coverage of Normal Pregnancy Would Increase Costs Substantially and Increase the Disproportionate Advantage to Female Workers

Calculations based on data collected by the Bell System Companies also confirms California's conclusion that the provision of benefits for normal pregnancy would substantially increase the cost of a disability program. This data also addresses the question which the court below considered unresolved,[20] indicating that coverage of normal pregnancy

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[17] *See* Wetzel v. Liberty Mutual Ins. Co., *supra* at 6-7.

[18] 374,707 for women to 66,982 for men in 1970-1971; 391,224 for women to 71,290 for men in 1971-1972.

[19] 58,785 for women to 28,951 for men in 1970-1971; 58,695 for women to 32,832 for men in 1971-1972.

[20] *See* Aiello v. Hansen, 359 F. Supp. at 798, quoted *supra* at 7.

would generate a significantly greater number of total disability days than any other category of sickness or injury, even combining the data for men and women.

Based on a substantial survey, it was determined that female Bell System employees experienced approximatly 21,700 pregnancies in fiscal year 1970-1971, and approximately 23,000 pregnancies in fiscal year 1971-1972. It is impossible to precisely fix the average term for which benefits would have been provided if normal pregnancy had been covered, since estimates of the period of actual disability connected with normal pregnancy range from less than six weeks to six months.[21] However, assuming an average duration of eight weeks,[22] normal pregnancy would have accounted for 1,215,200 disability days in 1970-1971 and 1,288,000 disability days in 1971-1972.[23] Had normal prgnancy been compensated, women, who represented 49% of the System's work force in 1970-1971, would have received benefits for 72% of the total disability days. In 1971-1972 women would have accounted for 71% of all benefit days though constituting only 48% of total employees eligible for benefits.

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[21] *See* Appendix at 6a-7a. This Court's recent decision in *Cleveland Bd. of Educ.* v. *La Fleur, supra*, recognized the "plethora of conflicting medical testimony," on the duration of any inability to work connected with pregnancy. Slip opinion at 11.

[22] This period is substantially less than the 15-week average of claims submitted to the State of California since the decision below.

[23] It is illuminating to compare these estimates with the 66,982 and 71,290 days lost by men in 1970-1971 and 1971-1972, respectively, due to all "Diseases of genitourinary system," of which prostate trouble is only a part. *See Wetzel*, discussed *supra* at 6-7.

Based on these calculations, together with the average salary and seniority of eligible women, system-wide costs for disability benefits would have been increased by $15,762,663 in 1970-1971 and $19,037,330 in 1971-1972.[24] However, the impact on the present distribution of sickness and accident disability benefits would be even more dramatic. If pregnancy had been covered in both of the survey years, 5% of eligible women, or approximately 2.5% of the System's work force, would have accounted for approximately 21% of the total days for which disability benefit payments were made. No other single disability group—even including both sexes—could generate so large a number of disability days for which benefits would be paid.[25]

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[24] Pregnancy alone would have accounted for 14.47% and 13.9% of all benefits paid in the respective survey years. These estimates reflect only basic disability costs, and do not include wage-related costs such as Social Security, pensions, health insurance, etc. Moreover, the estimate is based on the assumption of an average disability period of eight weeks. Payment for the full, average maternity leave period of 5½ months would have increased these costs to $32,739,007 and $39,539,070, respectively.

[25] The statistics from the U.S. Department of Health, Education, and Welfare, *Current Estimates from the Health Interview Survey* (1967), cited by Appellees in their Motion to Affirm at 15, will not support a contrary position. The National Health Interview Survey on which this data is based is designed to exclude absences from work due to *normal* pregnancy:

> Some readers of this series of reports have requested clarification of the content of this estimate. Although disability days are recorded only for illness and *normal pregnancy is not considered illness*, complications for pregnancy are included in this estimate when they are deemed to be illness by the respondent. Deliveries during the 2-week reference period are counted as "illness" since hospitalization is involved. Thus, days in the hospital for delivery and days of disability reported by the respondent immediately following discharge from the hospital are included with the count of restricted activity days. However, *maternity leave as such*,

III. The Low Return Rate Makes Maternity Leaves Unlike Sickness and Accident Disabilities for Job-Related Purposes

Neither the Constitution nor Title VII requires States or private employers to provide any disability benefits, and the Bell System Companies agree with the State of California's conclusion that its decision to provide protection against illness and injury should not obligate it to provide benefits for another condition which cannot properly be classified as either an illness or a disability. The Bell System Companies also agree with the State of California's conclusion that absences from work for pregnancy and childbirth are substantially different from absences caused by sickness or accident disabilities. Perhaps the most significant distinction for private employers, who consider disability benefits as part of an overall compensation package, is the difference in return rates for the workers in each category.

A survey of maternity leaves and absences caused by sickness and accident disabilities conducted by Illinois Bell in 1972 showed that only about 3% [20] of those who

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not associated with a spell of illness, is not included in the estimate.

U.S. Department of Health, Education, and Welfare, *Acute Conditions, Incidence and Associated Disability* (1970-1971) at 2, 4 (emphasis added).

Therefore, the "days of restricted activity" reported for "Deliveries and Disorders of Pregnancy and the Puerperium" in Tables 3 and 4 (Motion to Affirm, Appendix A) are more nearly comparable to the complicated and abnormal pregnancies presently covered by the California and Bell System plans (Group 11, Group 15) than to the work-loss days which would result from the coverage of normal pregnancy.

[20] The vast majority (almost 90%) of those who did not return to work following a covered disability had either died or become eligible for a company pension.

had been disabled failed to return to work while over 48% of employees who took maternity leave did not return following their leave. Projecting this estimate for the System as a whole, 7.6 and 9.1 million dollars of the estimated cost of providing maternity benefits in the respective survey years, would have gone to claimants who never returned to work. These payments would have been inconsistent with the disability programs' basic purpose of providing a bridge between periods of employment and would have constituted a unique form of severance pay.

CONCLUSION

The Bell System Companies believe that the information submitted based on the operation of their sickness and accident disability programs confirms the State of California's assertions regarding the impact of covering normal pregnancy under its disability insurance program. The inclusion of such benefits would be most expensive and would further expand the disproportionate advantage women presently enjoy in disability plan benefits. The data further demonstrates that normal pregnancy, if covered, would account for a larger amount of benefit payments than any other category of sickness or accident disabilities. Finally, data regarding the rate of return for workers following maternity leave and following disability absences, shows that the two conditions are significantly different for employment-related purposes.

Based on these considerations, the Bell System Companies contend that it is unreasonable to require a State or private employers to treat normal pregnancy as they treat sickness and accident disabilities.

They, therefore, urge that the decision of the district court be reversed.

Respectfully submitted,

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Dated February 8, 1974.

APPENDIX

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202-466-5557

LEE SATTERFIELD
EXECUTIVE ASSISTANT AND ATTORNEY

January 28, 1974

Mr. Philip J. Davis
Director
Office of Federal Contract Compliance
U. S. Department of Labor
14th and Constitution Ave., N.W.
Washington, D.C. 20210

Dear Mr. Davis:

In response to your request, I am transmitting the enclosed data relevant to the proposed revisions to the Office of Federal Contract Compliance Sex Discrimination Guidelines, 38 Fed. Reg. 35336-35338 (Dec. 27, 1973), on behalf of the American Telephone and Telegraph Company and the Associated Bell Companies. This data focuses on proposed Section 60-20.3(h)(2), which provides in part:

> Medically verifiable disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are for all job-related purposes, temporary disabilities and shall be treated as such under any health or temporary disability insurance policies or sick leave plans available in connection with employment . . .

This section would reverse the present position of OFCC that, "There is no requirement that an employee be paid during absence [for maternity leave]." Memorandum of John L. Wilks, Director, OFCC, to Agency Heads, November 12, 1970, at 5.

Without regard to legal arguments against adoption of proposed Section 60-20.3(h)(2), which undoubtedly will be developed by other interested parties, the attached data statistically demonstrates: (1) the present treatment of men and women under the Companies' sickness and accident disability plan; (2) the cost and impact on the male and female share of disability benefits which would occur if normal pregnancy were treated as a sickness or accident; and (3) the fact that nearly half of those taking maternity leave do not return to work which sharply distinguishes the nature of their absence for employee benefit purposes from accident and sickness absences.

Based on this data, as well as the settled medical opinion that pregnancy is neither a sickness nor accident, we urge that OFCC *not* adopt proposed Section 60-20.3(h)(2), but maintain its present position that federal contractors need not provide sickness and accident benefits for pregnancy.

LEE SATTERFIELD
Executive Assistant
& Attorney

Bell System Data Relevant to Proposed Revisions in OFCC Sex Discrimination Guidelines Regarding Treatment of Absences Due to Normal Pregnancy

I. INTRODUCTION

Recently, six companies in the Bell System (Illinois, Southern, South Central, New York, Long Lines and Pacific) have been sued by parties attacking the legality of their sickness and accident disability programs. The crux of these charges is that the failure to treat normal pregnancy as a disability under sickness and accident disability programs, constitutes discrimination against female employees on the basis of sex. Other major employers,

such as General Motors, General Electric, and Delta Air Lines,[1] are facing similar legal challenges, and initial court decisions are now being rendered. For example, a federal district court in Atlanta recently held that Delta Air Lines could not require female employees to leave work at a specific time prior to delivery, but that absence due to pregnancy and childbirth need not be covered under an accident and sickness disability program. *Newmon* v. *Delta Air Lines, Inc.*, Civ. No. I5681 (N.D. Ga., Dec. 31, 1973). *But see, Wetzel* v. *Liberty Mutual Insurance Co.*, Civ. No. 72-169 (W.D. Pa., Jan. 9, 1974).

Since no company in the Bell System treats normal pregnancy as an accident or sickness disability, the implications of these pending cases will reach beyond the companies directly involved. Every company in the System will be affected by the results of these suits. In light of these legal challenges to current sickness and accident disability programs, it is appropriate to review the operation of the Bell System sickness and accident disability program and to estimate its current effect on employees and the effects which would result by treating pregnancy as a sickness or accident disability.

II. Present Disability Plans

The sickness and accident disabilities of Bell System employees are classified, for record keeping purposes, into seventeen basic groups (see Table 1) which cover every disability recognized under the various plans within the System. For example, disabilities are grouped into infective and parasitic diseases, mental disorders, diseases of the circulatory system, the digestive system, the musculoskeletal system, and even accidents, poisonings and violence. Within each of these groups, the System's

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[1] Grogg v. General Motors Corp., 73 Civ. No. 63 (KTD) (S.D. N.Y.); Gilbert v. General Electric Co., No. 142-72-R (E.D. Va.); Newmon v. Delta Air Lines, Inc., Civ. No. I5681 (N.D. Ga.).

records reflect, by sex, the frequency of occurrence of each group of disability, the number of disability absences, and the duration of these absences (see Tables 2 and 3).

An examination of the Bell System sickness and accident disability figures for the fiscal year 1970-71 (see Table 2), reveals that in sixteen of the seventeen disability group classifications the frequency rate of women absent from work was higher than for men; the number of cases of women disabled was higher than for men; and women lost more total days from work than men.[2] Finally, an examination of the severity rate (average duration) of these absences indicates that women were generally absent for a longer period than men. While women were 48.57% of the System's total work force eligible to receive disability payments as of December 31, 1970, a review of the System's disability statistics, including all disability groups, reveals that they received wage benefits for 64.65% of the total days for which such benefits were paid during fiscal year 1970-71. Thus, even without treating normal pregnancy as a sickness or accident disability, in fiscal year 1970-71 women collected benefits for a percentage of days far in excess of their percentage of the company work force. It should be recognized that wage replacement benefits were paid to women absent on account of complications of pregnancy and childbirth.[3]

Fiscal year 1971-72 reflects the same sort of pattern as 1970-71 (see Table 3). In the same sixteen of seventeen disability group classifications, women were absent at a higher rate than men; experienced more disabilities than men; and lost more days from work than men. Finally, the

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[2] The one disability group category where men are absent at a higher rate than women, experience more disabilities than women, and lose more disability days than women is diseases of the circulatory system, which includes heart attacks and similar cardiac problems. (See Tables 2 and 3.)

[3] See classifications 11 and 15, Tables 1, 2, and 3.

statistics again show that generally, when absent, women were absent for longer periods than men. Although women made up 48.29% of the Bell work force eligible for disability payments as of December 31, 1971, they accounted for 63.45% of the total days for which benefits were paid in all disability groups during fiscal year 1971-72. Again this disproportionate figure reflects the present operation of the Bell Companies' disability programs, which are under attack, and which do not treat normal pregnancy as a sickness or accident disability.

III. The Effect of Treating Pregnancy As A Sickness or Accident Disability

Since disability payments for pregnancies would be made only to women, treating normal pregnancy as a sickness or accident disability would mean that women employees would receive even greater benefits than the disproportionate benefits they already receive.

In late 1973, eight companies in the System performed a manual count of the number of maternity leaves that had been granted in 1972. These companies then compared this count with the total number of female employees as of December 31, 1972. The results are as follows:

Company	Number of Maternity Leaves Granted in 1972	Number of Female Employees as of December 31, 1972	Percent
New York	2,406	48,115	5.00
New Jersey	761	16,113	4.73
Chesapeake and Potomac	1,274	23,861	5.34
Ohio	732	13,321	5.50
Illinois	1,036	20,968	4.94
Northwestern	834	14,596	5.72
Southwestern	1,700	39,316	4.33
Pacific Northwest	533	9,969	5.35
Totals	9,276	186,259	4.98

By projecting the results of this eight company survey,[4] a fairly accurate estimate can be made of the System-wide effect of treating pregnancy as a sickness or acident disability.

The Bell System Companies employed approximately 434,400 women eligible for disability benefits in fiscal year 1970-71 (as of December 31, 1970). Assuming 5% of these women took maternity leave in that fiscal year, the System would have had to provide disability payments for approximately 21,700 pregnancies if maternity had been treated as a sickness and accident disability during this period. No figures have yet been compiled that accurately reflect the average length of maternity leave taken throughout the System; nevertheless, figures compiled by Illinois Bell indicate that within that Company the average maternity leave per pregnancy has been approximately 5½ months. Of course, it is reasonable to assume that most women would not be disabled for 5½ months as a result of normal pregnancy and childbirth. Indeed, the testimony of medical experts for both sides in a court action pending against General Electric (see note 1 *supra*) that is similar to the suits the Bell Companies are facing indicates that the total period of disability may be less than six weeks. However, two courts have held in a related context that eight weeks may be an appropriate estimate of the time necessarily lost from work due to pregnancy.[5] Using such an eight week period for calculations, and keeping in mind that the actual period could be found to be considerably

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[4] The companies involved in this court have almost 40% of the System's female employees and represent a cross section of the entire Bell System. Thus, there is no reason to believe that the composite figures presented by this survey would not be valid estimates of figures for the entire System.

[5] Health v. Westerfield Board of Education, 345 F. Supp. 501 (S.D. Ohio, 1972); Doe v. Osteopathic Hospital, 3 FEP 1128 (D. Kans., 1971).

longer, or shorter,[6] if the estimated 21,700 women who took maternity leave in fiscal year 1971 had received disability benefits for eight weeks each, an additional 1,215,200 disability days would have been covered in that year. Thus, instead of receiving benefits for almost 65% of the days for which disability payments were made, women, who represented approximately 49% of the System work force eligible for benefits during this period, would have received benefits for over 72% of the days for which disability payments were made.

Similarly, if 5% of the System's fiscal year 1971-72 female work force eligible for disability benefits, approximately 461,500 women as of December 31, 1971, had received disability benefits for maternity absence in that period, a total of approximately 23,000 pregnancies would have been covered. Assuming disability payments had been made for an average of eight weeks for each of these pregnancies, an additional 1,288,000 disability days would have been paid in 1971-72. Therefore, women, who represented approximately 48% of the System work force during that period, would have collected 71% of the total disability days.

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[6] A recent example of the conceivable magnitude of payment periods occurred in Illinois. The State Fair Employment Practices Commission awarded two claimants disability payments for the full six months of their maternity leaves. Elliott v. Turner Co., (Charge No. 72C-1155, December 12, 1973); Bennett v. Turner Co., (Charge No. 72C-1156, December 12, 1973). If the estimated 21,700 women who took maternity leaves in the System during fiscal year 1970-71 had received disability payments for the entire period of their 5½ month maternity leave (145 days), an additional 3,146,500 days of disability benefits would have been paid in the System. In other words, pregnant women would have received benefits due to their pregnancies for more disability days than all other women received for their non-pregnancy related disability absences; furthermore, pregnant women would have been paid for nearly twice as many disability days due to their pregnancies than were paid to men for all their disabilities!

If pregnancy had been covered during these periods as an eight week disability, 5% of the women, or approximately *2.5% of the System's work force, would have accounted for approximately 21% of the total days for which disability payments were made* in both fiscal years 1970-71 and 1971-72. No other single disability group—even including both sexes—could generate so large a number of disability days for which benefits would be paid.

These figures demonstrate that treating pregnancy as a sickness or accident disability would create a situation far different from the picture of "equality" painted by opponents of the present disability programs. Indeed, the statistics reveal that women employees already are receiving a significantly greater number of paid benefit days for disabilities than are male employees. Treating pregnancy as a sickness or accident disability would further reduce the percentage of disability days paid to male employees.

Moreover, there can be no doubt that the cost of treating normal pregnancy as a sickness or accident disability would be immense. Using the previously mentioned figures which were compiled in late 1973 as the basis for projection, representative costs can readily be estimated. All employees are entitled to disability wage payments on the basis of seniority. An Illinois Bell study indicates that the average seniority of women taking maternity leave is between two and five years. Employees with 2-5 years service may receive up to full wage pay for their first week of absence as a departmental expense paid by the Company. Disability plan wage payments begin on the eighth calendar day of absence. During the first four weeks of a disability period, an employee with 2-5 years of service receives full wage pay. Subsequently, for a forty-eight week period disability payments equalling one-half the weekly salary are paid.

The average weekly wage of women with 2-5 years seniority, who were employed by the System Telephone Operating Companies in fiscal year 1970-71 as of December 31, 1970, was $111.75. If eight weeks of disability benefits had been made to pregnant employees, using the average length of Company service of those taking maternity leave during this period and the average wage of these female employees during 1970-71, the cost impact of wage continuation payments that would result from treating pregnancy as a sickness or accident disability can be estimated. Given the figures discussed above, the wage costs of treating each pregnancy as an eight week disability would have been $726.39 per pregnancy.[7] The System-wide costs for all 21,700 pregnancies in fiscal year 1970-71 would have been $15,762,663 in basic wages; in other words, approximately 2.5% of the System's work force would have received 14.47% of the basic wage benefit dollar. This does not include other wage related costs such as Social Security, pensions, health insurance, etc.[8]

The figures for fiscal year 1971-72 are comparable. The average weekly wage of female employees with 2-5 years seniority, who were employed during this period as of Decembr 31, 1971 was $127.34. Assuming the same seniority and average disability figures applied to fiscal year 1970-71 above, the wage costs of treating each 1971-72 pregnancy as a sickness and accident disability would have been $827.71. The costs for all 23,000 pregnancies within

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[7] This assumes that a pregnant employee received full wages for her first week of absence (which may be paid by the Company as a departmental expense), followed by full pay for the next four weeks' absence and half pay for the last three weeks' absence under the Company's disability plan.

[8] This also does not include the cost of establishing and administering a program to determine the length of each normal pregnancy disability and the amount of disability payments to be made for each such pregnancy.

the System during this period would have been $19,037,330[9] in basic wages, not including other wage related costs. Again, had normal pregnancy been treated as a sickness and accident disability, a significant portion of the basic wage benefit dollar (13.90%) would have been concentrated in a small percentage of the work force (approximately 2.5%).

IV. Maternity Leave Return Rate

No System-wide figures indicating the precise work return rate from maternity leave and other disabilities have yet been prepared; nevertheless, Illinois Bell Telephone Company recently completed such a study. The results clearly established another factor indicating the questionable equity and financial wisdom of treating pregnancy as though it were a sickness or accident disability. The Illinois study reveals that in calendar year 1972 all but approximately 3% of those employees who were absent as a result of presently covered sickness and accident disabilities returned to work.[10] By comparison, however, during the same period more than 48% of employees who took maternity leave did not return to the Illinois Bell work force following their leave. Projecting the results of this

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[9] These figures represent an average of eight weeks disability for each pregnancy. As noted earlier, see footnote 6, this figure could be increased significantly by administrative or judicial decisions. If the entire period of an average 5½ month maternity leave were treated as a disability for purposes of the sickness and accident program, the fiscal year 1971 and 1972 costs of the Bell Companies in basic wages alone, would have been $32,739,007 and $39,539,070 respectively.

[10] The vast majority (almost 90%) of employees who did not return to work after absences as a result of presently covered sickness and accident disabilities either died or became eligible for company pensions. Only 0.57% of Illinois Bell's employees actually resigned from company service after absences presently covered by the sickness and accident disability program.

study to the entire System, the inequity of covering pregnancy as a sickness or accident disability is manifest. If the treatment of pregnancy as a sickness or accident disability would have accounted for between approximately 15.7 million dollars of basic wage benefit payments in fiscal year 1971 and 19.0 million dollars in fiscal year 1972 (assuming an eight week disability period for both fiscal years) approximately 7.6 and 9.1 million dollars of the yearly wage benefits paid in these respective fiscal years would have gone to claimants who never returned to work! These wage payments would not have served as a bridge to carry workers between periods of employment, which is the basic purpose of disability benefits, but instead would have constituted a unique form of severance pay.

V. Conclusion

The statistical evidence discussed above highlights the effects of treating pregnancy as a sickness and accident disability. An examination of this evidence raises serious doubts about the equity of so treating pregnancies. Already women receive wage benefits for days of absence as a result of sickness and accident disabilities that are greatly disproportionate to the wage continuation benefits which men receive. Treating pregnancy as a sickness and accident disability no matter how brief the average period of such disability, can only further distort this important benefit in favor of female employees. The cost impact of accomplishing this questionable result will be immense. Furthermore, the wage benefit payments received under this coverage, although amounting to millions of dollars, will inure to the benefit of only 5% of the Bell Companies' female employees—less than 2.5% of the work force. Finally, a look at the work return rates of employees taking maternity leave indicates that nearly half of the benefits paid for pregnancy would be paid to women who will never return to the System's work force.

Table 1

Sickness and Accident Summary Bell System

Group 01	Infective and parasitic diseases
Group 02	Neoplasms
Group 03	Endocrine, nutritional and metabolic diseases
Group 04	Diseases of blood and blood-forming organs
Group 05	Mental disorders
Group 06	Diseases of nervous system and sense organs
Group 07	Diseases of circulatory system
Group 08	Diseases of respiratory system
Group 09	Diseases of digestive system
Group 10	Diseases of genitourinary system
Group 11	Complications of pregnancy, childbirth and puerperium
Group 12	Diseases of skin and subcutaneous tissue
Group 13	Diseases of musculoskeletal system and connective tissue
Group 14	Congential anomalies
Group 15	Perinatal morbidity and mortality
Group 16	Symptoms and ill-defined conditions
Group 17	Accidents, poisonings and violence

Table 2

Total Bell System Sickness and Accident Figures for Fiscal Year 1970-71

Disability Category	Sex	No. of Cases	Frequency Rate Per 1,000 Employees	Severity Rate (average duration of illness)	Total Days Lost
01	M	2,726	5.9	26.3	71,647
	F	5,422	12.5	27.1	146,930
02	M	1,204	2.6	66.6	80,173
	F	4,991	11.5	55.6	277,647
03	M	745	1.6	38.9	28,951
	F	1,134	2.6	51.8	58,785

Disability Category	Sex	No. of Cases	Frequency Rate Per 1,000 Employees	Severity Rate (average duration of illness)	Total Days Lost
04	M	93	0.2	40.6	3,774
	F	535	1.2	36.7	19,634
05	M	1,527	3.3	57.2	87,285
	F	3,306	7.6	67.6	223,503
06	M	1,560	3.4	44.3	69,064
	F	2,592	6.0	42.1	109,132
07	M	4,637	10.1	69.4	321,773
	F	3,582	8.2	62.2	222,723
08	M	8,693	18.9	19.5	169,537
	F	18,397	42.3	19.2	353,955
09	M	5,488	11.9	38.1	208,816
	F	5,744	13.2	41.5	238,532
10	M	2,289	5.0	29.3	66,982
	F	11,137	25.6	33.6	374,707
11	M	—	—	—	—
	F	3,104	7.1	27.8	86,438
12	M	1,154	2.5	25.6	29,574
	F	1,617	3.7	28.6	46,319
13	M	3,941	8.6	46.4	182,686
	F	5,142	11.8	53.0	272,352
14	M	149	0.3	51.6	7,668
	F	304	0.7	42.2	12,822
15	M	—	—	—	—
	F	328	0.8	58.2	19,084
16	M	1,391	3.0	29.8	41,418
	F	2,909	6.7	34.6	100,758
17	M	5,694	12.4	37.4	212,981
	F	7,696	17.7	42.9	330,467

Days Lost	
Male	1,582,329
Female	2,893,788
TOTAL	4,476,117

Table 3

Total Bell System Sickness and Accident Figures for Fiscal Year 1971-72

Disability Category	Sex	No. of Cases	Frequency Rate Per 1,000 Employees	Severity Rate (average duration of illness)	Total Days Lost
01	M	2,594	5.2	30.4	78,904
	F	5,108	11.1	29.3	149,470
02	M	1,305	2.6	70.0	91,352
	F	5,390	11.7	57.6	310,518
03	M	719	1.5	45.7	32,832
	F	1,172	2.5	50.1	58,695
04	M	121	0.2	43.5	5,252
	F	462	1.0	43.9	20,281
05	M	1,568	3.2	62.4	97,893
	F	3,445	7.5	66.6	229,558
06	M	1,557	3.2	47.3	73,652
	F	2,584	5.6	44.7	115,477
07	M	5,007	10.1	73.0	365,723
	F	3,950	8.6	61.7	243,865
08	M	10,093	20.4	18.9	191,101
	F	21,789	47.2	18.7	408,365
09	M	5,699	11.5	39.4	224,655
	F	5,994	13.0	42.3	253,522
10	M	2,441	4.9	29.2	71,290
	F	11,262	24.4	34.7	391,224
11	M	—	—	—	—
	F	2,738	5.9	29.0	79,410
12	M	1,325	2.7	28.0	37,150
	F	1,627	3.5	30.1	48,936
13	M	4,129	8.4	49.4	203,846
	F	5,419	11.7	55.8	302,345

Disability Category	Sex	No. of Cases	Frequency Rate Per 1,000 Employees	Severity Rate (average duration of illness)	Total Days Lost
14	M	172	0.3	46.2	7,941
	F	339	0.7	53.5	18,119
15	M	—	—	—	—
	F	255	0.6	59.5	15,164
16	M	1,487	3.0	30.3	45,111
	F	3,103	6.7	38.0	118,036
17	M	6,597	13.3	40.0	264,127
	F	7,904	17.1	43.6	344,862

Days Lost	
Male	1,790,829
Female	3,107,847
TOTAL	4,898,676

In the Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U.
FILED
FEB 9 197
MICHAEL RODAK, JR.,

No. 73-640

DWIGHT GEDULDIG,

Appellant,

v.

CAROLYN AIELLO, individually and on behalf of all others similarly situated,

Appellees.

DWIGHT GEDULDIG,

Appellant,

v.

AUGUSTINA D. ARMENDARIZ, ELIZABETH B. JOHNSON, JACQUELINE JARAMILLO, individually and on behalf of all other women similarly situated,

Appellees.

CONSOLIDATED CASES ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Brief for Appellant

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-640

DWIGHT GEDULDIG,

Appellant,

v.

CAROLYN AIELLO, individually and on behalf of all others similarly situated,

Appellees.

DWIGHT GEDULDIG,

Appellant,

v.

AUGUSTINA D. ARMENDARIZ, ELIZABETH B. JOHNSON, JACQUELINE JARAMILLO, individually and on behalf of all other women similarly situated,

Appellees.

CONSOLIDATED CASES ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Brief for Appellant

OPINIONS BELOW

The majority and dissenting opinions of the three-judge court declaring unconstitutional the third sentence of section 2626 of the California Unemployment Insurance Code

("U.I.C." hereafter) is reported at 359 F.Supp. 792 (N.D. Cal. 1973). The majority's summary order and Judge Williams' dissenting memorandum denying appellant's motion to reconsider and set aside the judgment of the district court are unreported. They are included in the Appendix at A-54-55.

JURISDICTION

These consolidated actions were brought by Appellees on behalf of themselves and all other pregnant women similarly situated, for injunctive and declaratory relief pursuant to Title 42 United States Code section 1983, and Title 28 United States Code sections 2201 and 2202. Jurisdiction of the District Court was invoked pursuant to Title 28 United States Code sections 1343(3) and (4). Appellees sought a declaration that the third sentence of California U.I.C. section 2626, which excludes pregnancy from coverage under the state disability insurance program, is an unconstitutional denial to women of equal protection of the laws, contrary to the Fourteenth Amendment. Appellees also sought an injunction against further enforcement of the pregnancy exclusion.[1] A petition in intervention was filed by several labor organizations on behalf of their female members seeking the same substantive relief as Appellees but also asking that relief be granted, and disability benefits for pregnancy paid, retroactively to December 14, 1969. Order granting the petitioners intervenor status was entered January 30, 1973.[2]

---

1. Since appellees sought an injunction against enforcement of a state statute, a three-judge court was convened under Title 28 United States Code sections 2281 and 2284.

2. The intervenors are United Automobile, Agricultural, Implement and Aerospace Workers of America (UAW); United Brotherhood of Carpenters and Joiners of America, AFL-CIO; California State Council of Carpenters; United Rubber, Cork, Linoleum and

The court heard the matter on cross motions for summary judgment and on May 31, 1973, two judges of the three-judge District Court held the pregnancy exclusion to be an unconstitutional denial of equal protection to women and enjoined appellant from further enforcing the third sentence of section 2626. The decision is silent on the question of retroactivity. Judgment was entered June 15, 1973.

Appellant filed a timely motion for reconsideration, based upon a change in state law, discussed below in more detail, which in effect narrowed the statute to exclude only maternity benefits for normal pregnancy and eliminated the exclusion for complications. The District Court, again in a two-to-one decision, denied rehearing on August 7, 1973. Appellant's Notice of Appeal to this Court was filed in the United States District Court for the Northern District of California on August 13, 1973 and is included in the appendix at A.57.

The jurisdiction of the Supreme Court of the United States to hear this direct appeal is conferred by Title 28 United States Code sections 1253 and 2101(b). *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970).

QUESTION PRESENTED

Did the district court err in holding that the State of California violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution

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Plastic Workers of America, AFL-CIO; International Ladies Garment Workers Union, AFL-CIO; Printing Specialties and Paper Products Union District Council No. 2; Social Services Employees Union, Local 535; Alameda County Central Labor Council, AFL-CIO; and Contra Costa County Labor Council, AFL-CIO, on behalf of all of the affiliated Unions of each of the above labor organizations representing the women members of said unions and on behalf of all other women similarly situated. No explanation was given by intervenors for selection of the date of December 14, 1969 in connection with retroactivity.

by denying monetary benefits to women for normal pregnancy pursuant to a state disability insurance program designed to provide benefits for illness or injury?

THE STATUTES INVOLVED

The specific statute challenged is California Unemployment Insurance Code, section 2626 (Stats. 1953, c. 308 p. 1531), which read, at the commencement of this action, as follows:

> "'Disability' or 'disabled' includes both mental or physical illness and mental or physical injury. An individual shall be deemed disabled in any day in which, because of his physical or mental conditon, he is unable to perform his regular or customary work. In no case shall the term 'disability' or 'disabled' include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter."

Effective January 1, 1974 this section has been amended and a related subsection added, as follows:

> [Section 2626]
>
> "'Disability' or 'disabled' includes both mental or physical illness, mental or physical injury, and, to the extent specified in Section 2626.2, pregnancy. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work....
>
> [Section 2626.2]
>
> "Benefits relating to pregnancy shall be paid under this part only in accordance with the following:
>
> "(a) Disability benefits shall be paid upon a doctor's certification that the claimant is disabled because of an abnormal and involuntary complication of pregnancy, including but not limited to: puerperal infec-

tion, eclampsia, caesarean section delivery, ectopic pregnancy, and toxemia.

"(b) Disability benefits shall be paid upon a doctor's certification that a condition possibly arising out of pregnancy would disable the claimant without regard to the pregnancy, including but not limited to: anemia, diabetes, embolism, heart disease, hypertension, phlebitis, phlebothrombosis, pyelonephritis thrombophlebitis, vaginitis, varicose veins, and venous thrombosis." (Stats 1973, c. 1026)

STATEMENT OF THE CASE

This is an appeal from a judgment of a three-judge district court for the Northern District of California, one judge dissenting, granting summary judgment against the State of California in consolidated actions by appellees which sought a declaration that section 2626 of the U.I.C., which does not provide benefits for pregnancy, constitutes a denial of equal protection of the laws contrary to the Fourteenth Amendment, and sought an injunction against further enforcement of that provision.[3] Appellant contended that the California code section under review represented an appropriate legislative determination by the State not to include pregnancy within a disability insurance program

3. The action on behalf of Carolyn Aiello and others was filed in the U.S. District Court for the Northern District of California on July 31, 1972. The action on behalf of Augustina Armendariz and others was commenced in the Supreme Court of the State of California on August 16, 1972, was removed to U.S. District Court on August 24, 1972, and was ordered consolidated with the Aiello case, to proceed under the Aiello title, on December 5, 1972. Appellees Aiello and Johnson suffered ectopic pregnancies; Appellee Armendariz suffered a miscarriage. All three applied for disability insurance benefits, which were initially denied but which have now been paid. Appellee Jaramillo's claim is unclear. She was eight months pregnant at the commencement of this action and had experienced no complications of pregnancy. She sought benefits for the period during which she would be incapacitated by the delivery of her child. However, she has never filed a claim for disability benefits, so far as is known to Appellant.

designed to provide benefits for illness or injury, because the condition of pregnancy is clearly distinguishable from illness or injury, and because including maternity benefits coverage within the disability insurance program would disproportionately channel the limited funds available to a small percentage of the work force and would ultimately destroy the solvency of the program as a whole. The District Court held that the failure to provide benefits for pregnancy was "not based upon a classification having a rational and substantial relationship to a legitimate state purpose" and was therefore unconstitutional.[4] The District Court also noted that "[t]he search for the purposes that actuated the legislature is a difficult one." As will be demonstrated, the exclusion of pregnancy has a very substantial relationship to a legitimate state purpose. Moreover, the history of the legislation and of the exclusion of pregnancy is very easy to find. The dissent of Judge Williams discusses the entire historical background of the disability insurance program at length.[5] The majority simply ignored it.

While this case was pending before the District Court, and unknown to the court or to the litigants, the California Court of Appeal for the Second Appellate District was considering a case entitled *Rentzer v. California Unemployment Ins. Appeals Bd.*, 32 Cal.App.3d 604 (1973) which also involved construction of section 2626 of the U.I.C. The *Rentzer* case was commenced by petition for writ of mandate in Los Angeles County Superior Court on January 19, 1972. Gail Rentzer had suffered an ectopic pregnancy which necessitated surgery to save her life. As a consequence, she was unable to work for six weeks. When the California Un-

4. 359 F. Supp. at 797.

5. 359 F. Supp. at 803-805.

employment Insurance Appeals Board denied her disability benefits for the first 28 days of her six-week disability, she petitioned the Superior Court for a writ mandating the California Unemployment Appeals Board to provide her with full disability benefits. Ms. Rentzer appealed the denial of her petition to the Court of Appeal. On May 29, 1973, the Court of Appeal rendered its opinion reversing the judgment of the Superior Court. In so doing, the Court, citing with approval an earlier California Court of Appeal decision, *Clark v. California Emp. Stab. Com.*, 166 Cal.App. 2d 326 (1958), hearing denied, construed the third sentence of section 2626 of the U.I.C. to exclude only "maternity benefits," that is, benefits for normal gestation and delivery. The California Court of Appeal decision in *Rentzer v. California Unemployment Ins. Appeals Bd.* is included in the Appendix at A .....

Following the *Rentzer decision*, the Department of Human Resources Development, on June 18, 1973, issued administrative guidelines excluding from coverage under section 2626 of the U.I.C., only "maternity benefits"—*viz.*, hospitalization and disability benefits for normal delivery and recuperation. Effective January 1, 1974, these administrative guidelines were codified as U.I.C. section 2626.2.

Based upon the substantial change in state law brought about by *Rentzer* and the ensuing revision of the state disability program, appellees Aiello, Johnson, and Armendariz have received benefits for their disabilities arising from complications of pregnancy. The only party still denied benefits is appellee Jaramilo who had a normal pregnancy and delivery. In light of this significant alteration of the issue before the court, appellant's timely motion for reconsideration should have been granted. From the Judgment and subsequent Order denying reconsideration, appellant brought this appeal.

SUMMARY OF ARGUMENT

California's decision not to provide a benefit, under its disability insurance program, for females who are absent from work due to normal pregancy and childbirth is a rational one. It is based upon important distinctions between normal pregancy and the illnesses and injuries intended to be covered by the program. It is also based upon the high frequency, long duration, and therefore very great cost, of pregancy-related absence. Because pregancy is a voluntary condition, whose very nature lends itself to planning—as well as planned use of the program—it lacks that element of the *unexpected* which is characteristic of most conditions intended to be compensated. Because a new life is involved, there are major differences between the medical treatment of pregancy and that of illness or injury. As a result, pregnancy has many more elements of difference than similarity to conditions covered by the disability insurance program.

The valid state objective of the disability insurance program, which is to cushion the blow of *unexpected* unemployment caused by non-industrial *illness* or *injury* at a *low cost* to the workers covered is completely thwarted by a requirement that normal pregnancy be compensated. The program is nondiscriminatory, both in purpose and in effect, and, as presently administered, it benefits women to a greater extent than it benefits men.

The restructuring of the disability insurance program called for by appellees and by the court below would create a program bearing little resemblance to that intended by its drafters. The cost of covering normal pregnancy is so substantial that the program could not continue in its present form and remain solvent. The State is therefore faced with a decision which will require the sacrifice of one or more of its stated objectives. The State could *significantly* increase

employee contributions; it could *substantially* reduce the level of benefits paid for illness and injury disabilities, or it could *greatly* extend the exclusionary period, in order to provide maternity benefits. None of these options is a satisfactory alternative. It is clear from the decisions of this Court that none is constitutionally required.

ARGUMENT

This case involves the California disability insurance program, under which normal pregnancy is not treated as an illness or injury. Complications of pregnancy, and worsenings of pre-existing conditions as a result of pregnancy are treated as disabilities, but the process of giving birth is treated as a normal physiological function. Appellees' challenge to this program is based upon the notion that giving birth *is* illness or injury, and that they are denied equal protection of the laws when this event is not compensated as if it were a disability.

Appellant contends that the decision below, through an inappropriate application of equal protection, has usurped the State's discretion in allocating limited insurance funds, based on the State's assessment of priorities. The practical result of the district court's decision is to legislate judicially that a State may not establish an insurance program aimed at meeting certain identifiable social welfare objectives unless it simultaneously undertakes to insure against all conditions which have any points of similarity to those covered.

There is nothing in the Fourteenth Amendment or in the decisions of this Court which mandate that a State's discretion in providing or allocating benefits is placed in such a constitutional straightjacket.

I. The Decision Not to Provide a Benefit for Female Workers Absent Due to Normal Pregnancy or Childbirth Is Supported by Legitimate State Objectives and Is Rationally Related to the Purposes of the Legislation.

A. THE PURPOSES OF THE LEGISLATION ARE READILY DISCERNIBLE.

Notwithstanding the majority's statement below that "[T]he search for the purposes that actuated the legislature [in establishing the California disability insurance program] is a difficult one," 359 F.Supp. at 797,[6] there is ample evidence of the reasons which underlie the disability insurance program and the limitation of section 2626, both in the legislative history of the provisions and in rulings of the California state courts.

Discussion of such a program began with then-Governor Earl Warren's message of January 23, 1946, to the California legislature which contained a proposal to shift a portion of the wartime surplus in the unemployment insurance fund to a disability insurance fund, utilizing the employee's 1% contribution to the unemployment insurance fund. The objective was to provide low-cost, non-job-related sickness and accident coverage out of a self-sustaining fund:

> "GENTLEMEN: In my message of January 7th I recommended that the Legislature eliminate the provisions of our Unemployment Insurance Act which now prevent compensation payments to workers *whose unemployment results from illness or injury.*
>
> • • •
>
> "[W]e have had eight years of experience and this experience demonstrates that disability compensation can be made available to workers without affecting the solvency of the fund and without the necessity for an additional contribution.

---

6. It is worth noting that Judge Williams, in dissent, fully explored the legislative history which establishes the purposes and objectives of the U.I.C. and Section 2626.

• • •

"The entire financing, including administration, would be met from the present 1 per cent employee contributions, and without any new or additional contribution from employers.

• • •

"It is not possible for employees to obtain from private insurance companies protection against loss of wages or salary during sickness as adequately or cheaply as the protection could be obtained by diverting their 1% contribution for the support of a Disability Benefits Program.

• • •

"Based on Rhode Island's actual experience, *and with allowances for differences between the Rhode Island Law and the program now under consideration for California,* the cost in California would approximate $35,000,000 a year.

"This cost could be met entirely out of the 1 per cent employee contribution." California Senate Journal, January 23, 1946, 227-229. (Emphasis added.)

The Rhode Island experience to which the Governor referred is instructive. Rhode Island initially included payments for pregnancy-related work absences. However, between 1944 when the plan began and mid-1946, the Rhode Island program incurred a deficit of $1.5 million. This led to a 1946 revision in the plan which placed limits on the maximum pregnancy benefits payable. *See* "Disability Compensation for the Disabled Sick" by Nathan Sinai, published by School of Public Health, University of Michigan (1949), pp. 29-31, for a discussion of this and other factors which resulted in differences in the California plan.

The legislation enacted in response to the Governor's message has as its stated purpose "to compensate in part for the wage loss sustained by individuals unemployed

because of sickness or injury. . . ."[7] The section defining disability is also couched in terms of "mental or physical *illness*" and "mental or physical *injury*."[8] (Emphasis added.)

Since their enactment, these California statutes have been interpreted by the State courts consistent with this initial purpose:

> "[T]he scope of section 2626 was considered in *Clark v. California Emp. Stab. Com.*, 166 Cal.App.2d 326 (1958), where a woman disabled from employment because of pregnancy challenged section 2626 as a denial of equal protection of the laws. In upholding the reasonableness and validity of the statutory exclusion the court said that exclusion of pregnancy-connected conditions amounted, in effect, to an exclusion of maternity benefits: '[T]o award disability compensation to women employees on account of illness caused by pregnancy, in effect, constituted a *maternity benefit plan* for a limited group, i.e., women employees. The purpose of the unemployment disability program is to afford relief to employees sustaining loss of wages on account of illness, and not to confer *maternity benefits*. To accomplish this purpose the Legislature was entitled legally to adopt such measures as might be necessary to exclude the indirect award of *maternity benefits* as an incident to the administration of its unemployment disability program. The consequent classification adopted has a substantial relation to the legitimate object thus sought to be accomplished.' (166 Cal.App.2d at 332; italics added.)
>
> "We agree with the court's conclusion that the legislative purpose in enacting the pregnancy exclusion of section 2626 was to spare the unemployment disability program the costs of a maternity benefit plan."

---

7. U.I.C. section 2601.
8. U.I.C. section 2626.

Rentzer v. California Unemployment Ins. Appeals Bd., 32 Cal.App.3d 604, 606-607 (1973).[9] The court found that Rentzer's ectopic pregnancy "was not an ordinary maternity disability involving preparation for and recuperation from normal gestation and delivery," and held her condition compensable precisely because it was not a normal pregnancy. *Rentzer*, 32 Cal.App.3d at 607.

As this history illustrates, there were several key objectives and purposes which led to the establishment of the U.I.C. *and* the exclusion of benefits for pregnancy and childbirth:

1. To provide partial income replacement during the interim period workers are forced to be absent from work due to illness or injury;

2. To create a self-sustaining fund which would not draw upon other state resources;

3. To retain a maximum 1% employee contribution which would afford less expensive protection than private insurance programs;[10] and

---

9. Although *Rentzer* was not brought to the lower court's attention until appellant's Motion for Reconsideration (Jurisdictional Statement, Appendix E), *Clark* was cited by Judge Williams in dissent.

Authoritative constructions of the purposes and objectives of state law are binding in federal court review of the legislation. See *Eisenstadt v. Baird*, 405 U.S. 438, 442 (1972); *Groppi v. Wisconsin*, 400 U.S. 505, 507 (1971).

10. Further support for the legislative intent to keep employee contributions at the minimal rate of 1% can be found in U.I.C. section 2604, which gives the agency director emergency powers to forestall insolvency by decreasing benefits or lengthening the waiting time for eligibility, *but not by increasing the rate of contribution*.

Subsequent legislation reaffirms the State's determination to retain solvency within the limits established. As part of a bill containing an urgency clause describing the need to increase cash inflow of funds the legislature authorized a significant increase in wages subject to withholding, and a closer tie-in between amount of benefits collectible and amount of contributions made. These fea-

4. Not to establish an incidental, yet fiscally prohibitive, maternity benefit plan.

Because pregnancy-related absences are not physiologically comparable to illness or injury, and because their inclusion necessarily would have exceeded the resources of the fund, they were excluded.

B. THE STATE OBJECTIVES ARE VALID AND LEGITIMATE.

There is no constitutional requirement that governments establish comprehensive public welfare assistance programs,[11] subsidized housing programs,[12] social security and workmen's compensation plans, or unemployment compensation programs.[13] All that is required is that such programs as are adopted "be rationally based and free from invidious discrimination." *Dandridge v. Williams*, 397 U.S. 471, 487 (1970). Stated another way, to pass equal protection muster, a State must demonstrate that its "statutory classification bear[s] some rational relationship to a legitimate state purpose." *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972).

---

tures along with certain technical adjustments were intended to be permanent. One expressly temporary change was:

> "The contribution rate shall be 1.1 percent with respect to the wages paid after July 31, 1965 and prior to January 1, 1966.
>
> "The contribution rate shall be 1 percent with respect to the wages paid after December 31, 1965."

The approach suggested by the majority below of increasing the limit on wages subject to withholding would not provide a solution to the cost of covering pregnancy. Even if the wage ceiling were entirely eliminated, it would not generate sufficient income to cover payments for normal pregnancy and childbirth.

11. *Cf. Jefferson v. Hackney*, 406 U.S. 535 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970).

12. *Cf. James v. Valtierra*, 402 U.S. 137 (1971).

13. *Cf. Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Richardson v. Belcher*, 404 U.S. 78 (1971).

Within this framework, statutory provisions which attempt to distribute social or economic benefits, even when the benefits involve such basic and important rights as education, *San Antonio Independent School District v. Rodriguez*, ... U.S. ....., 93 S.Ct. 1278, 1997 (1973), or minimum levels of economic subsistence, *Dandridge*, 397 U.S. at 485, need not be the most complete that could be devised. *Rodriguez, Jefferson, Dandridge, supra*. So long as the State's system does not irrationally ignore the basic purposes of the legislation in allocating benefits, this Court has recognized "more than one constitutionally permissible method of solving" the problem at hand. *Rodriguez*, 93 S.Ct. at 1301.

Reviewing the four primary purposes and objectives of the U.I.C. set forth above,[14] the State of California can demonstrate that each is a legitimate state concern. The first three are, collectively, the fiscal objectives of the program: they reflect a concern to compensate workers during periods when their employment is temporarily interrupted by illness or injury and an overriding concern that employee contributions be limited to a 1% maximum, without resort to other fiscal resources. The fourth represents a legislative policy decision not to establish a maternity benefit plan for women who leave work for reasons of normal pregnancy and childbirth, based in part on the experience of Rhode Island.[15]

This Court, and the majority below,[16] have indicated that the fiscal concerns demonstrated here are clearly legitimate interests which a state may protect. *E.g., United States v. Kras*, 409 U.S. 434 (1973); *Shapiro v. Thompson*, 394 U.S.

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14. *Supra*, at 13-14.

15. *See* discussion *supra* at 11.

16. 359 F. Supp. at 798.

618 (1969). The objective of providing income supplementation for ill and injured workers is clearly a legitimate state objective. *Cf. Weber v. Aetna Casualty & Surety Co., supra, Richardson v. Belcher,* 404 U.S. 78 (1971). The failure to establish a companion maternity benefit program in itself is not constitutionally proscribed. *Cf. Rodriguez, Jefferson, Dandridge, supra.*

The majority below found that the failure to include benefits for normal pregnancy and childbirth in the California U.I.C. program lacked any "rational and substantial relationship to the legitimate state purpose." 359 F.Supp. at 801. Appellant believes that *each* of the four purposes set forth above is manifestly aided by the exclusion of normal pregnancy from an illness and injury benefit plan. Unless each of these purposes can be characterized as beyond the constitutional bound of legitimate state interests, the opinion below must be reversed.

II. Employees Absent from Work Due to Normal Pregnancy Are Not Similarly Circumstanced to Those Absent Due to Illness or Injury.

There can be no denial of equal protection unless a State has acted differently with respect to individuals or groups "similarly circumstanced," since this Court has repeatedly held that "the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways." *Reed v. Reed,* 404 U.S. 71, 75-76 (1971). There are demonstrable differences between normal pregnancy and the illnesses and injuries with which the U.I.C. is concerned. There are also differences between the absence from work resulting from pregnancy and that caused by illness or injury, in terms of severity, duration, and frequency of non-return to work which are relevant to the purposes of the program.

In failing to recognize the practical differences between pregnancy and illness and injury disabilities, the judgment of the Court below was no doubt influenced by the fact that, at the time of its decision, the disability insurance program excluded abnormal and complicated pregnancies from coverage as well. Three of the four plaintiffs in the case had suffered extreme complications "resulting in dramatic objective, medically verifiable disabilities." 359 F.Supp. at 801. The court specifically relied on the facts of these extraordinary pregnancy claims in rejecting the State's justifications for the U.I.C.'s treatment of pregnancy generally. Based on a change in State law,[17] appellant sought reconsideration by the district court of the much narrower question whether the State could lawfully exclude benefits for *normal pregnancy* from the disability insurance program. By denying appellant's motion, the district court in effect concluded that even normal pregnancy is indistinguishable from illness and injury for purposes of the U.I.C.[18] The discussion which follows demonstrates that this conclusion is unfounded.

A. PREGNANCY IS NEITHER ILLNESS NOR INJURY BUT RATHER A NORMAL BIOLOGICAL FUNCTION.

Settled actuarial, medical and sociological authority demonstrates the dissimilarity of the nature and consequences of pregnancy from the illness and injury disabilities covered by the U.I.C.[19] The record before this Court in its

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17. *See* discussion of *Rentzer, supra* at 6-7.

18. See dissent of Williams, J., from the order of the district court denying rehearing. A.56.

19. The affidavit of appellee Elizabeth B. Johnson accepts the distinction between a normal and a complicated pregnancy. She states: "I do not understand why this debilitating illness (ectopic pregnancy) was treated and penalized by Human Resources Development Department *just as if it were a normal, consciously chosen, healthy and successful pregnancy.*" (A.18) (Emphasis added.)

recent decision in *Cleveland Board of Education v. La Fleur*,[20] demonstrates the unique nature of pregnancy. One eminent specialist testified:

> Q. Is pregnancy a sickness or injury?
>
> A. No.
>
> Q. Could you give a medical definition of what pregnancy is in physical relationship?
>
> A. It is a normal biologic function. It should not be regarded as illness anymore than menstrual periods are regarded as an illness. An illness is when [a] bodily function is deranged, there is [a] malfunction of symptoms and pregnancy is, of course a normal biologic phenomena.[21]

The concurring opinion of Justice Powell recognizes that: "pregnancy is a normal biological function."[22] In "The Sick Role—Illness and Pregnancy," 6 Social Science and Medicine 561 (1972), at 568-571, the author, John B. McKinlay, Associate Professor of Sociology at Boston University, explains that pregnancy does not mesh with the concept of the "sick role," for these reasons:

> 1. It is considered statistically normal, in that most of the possible conceivers do conceive at some time. Cancer, coronary thrombosis and pneumonia are not, in this sense, normal "facts of life" or "natural vicissitudes."

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20. No. 72-777 decided together with *Cohen v. Chesterfield County School Board*, No. 72-1129, January 21, 1974 (hereinafter cited as *La Fleur*).

21. Testimony of Dr. Leo J. Dunn, Professor and Chairman of Obstetrics and Gynecology, Medical College of Virginia, quoted in respondent's brief to Supreme Court, pp. 12-13, in *Cohen v. Chesterfield, supra*.

22. *La Fleur, supra* (Powell, J., concurring), slip opinion at 2. The opinion further recognizes that: "Teachers who undergo abnormal pregnancies may well be disabled, either temporarily or for a substantial period. But as I read the Court, boards may deal with abnormal pregnancies like any other disability. *Ante*, at 9 n. 10." *Id.* at 5 n. 3.

2. Pregnancy is a normal biological function necessary for survival of the species. Sickness jeopardizes survival.

3. Pregnancy is normal because usually desirable. One often congratulates a woman who is pregnant, while those with sicknesses are not congratulated but are treated as abnormal and stigma often attaches.

4. A pregnant woman need not be motivated to "get well." The factor of motivation to recover is often crucial in restoration of health in real sickness cases.

The factual difference between normal pregnancy and disability arising from illness or injury demonstrates that women experiencing a normal pregnancy are not "similarly circumstanced" when compared to men *and women* who are disabled for other physical or mental reasons.

B. ABSENCES FROM WORK IN CONNECTION WITH PREGNANCY AND CHILDBIRTH ARE DISSIMILAR TO THOSE CAUSED BY ILLNESS AND INJURY.

Absences from work which result from normal pregnancy and childbirth are significantly different from those which result from illness and injury in ways which are relevant to the objectives of the disability insurance program. Pregnancy is, to a much greater extent than any illness or injury, voluntary and subject to planning.[23] Included in that planning, as noted by the dissenting opinion of Judge Williams, is the possibility of planned use of the disability insurance program:

> "In order for a worker to collect maximum benefits of $105 per week for 26 weeks, it is only necessary to earn $8,500 per year and have 1% of that sum, or $85.00 per year withheld as a disability insurance contribution.

23. *See Roe v. Wade*, 410 U.S. 113 (1973). Even where pregnancy is unexpected, the period of actual inability to work can be anticipated months in advance, and the attendant expenses calculated and met in other ways.

> If pregnancy were covered, a woman not ordinarily pursuing a career, could go to work for one year, and would then be eligible to collect $2,730 in pregnancy benefits if her doctor will certify that she is temporarily disabled from working the full 26-week period." 359 F. Supp. at 806.

Judge Williams' observations suggest another difference between pregnancy and disabilities due to illness or injury. Pregnancy generally prompts a request for leave which is substantially longer than any actual inability to work. While it is possible to distinguish between maternity leave and the shorter period of time a female employee is actually unable to work because of childbirth, in practice disability claims tend to be made for the traditional maternity leave period. The claims for disability payments received by the State since the decision below average 103 days, or approximately 15 weeks.[24] It can also be expected that maternity leaves will be requested based on concern for the welfare of the child, in addition to any disability on the part of the employee.[25]

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24. See affidavit of Joanne Condas. A.59. It should be noted that these claims, which have been certified by physicians, evidence a most liberal attitude on the part of the medical profession toward pregnancy-related disabilities.

25. The record contains a claim received by appellant involving a doctor's certification that the unborn child's health—not the mother's—would be endangered by her continued working in a chemical plant. A.61.

After delivery, concern for the child may continue to affect the mother's activities:

> "While pregnancy and postpartum care are states of health and not illness, a little conservative management does not hurt. Rest will determine the milk production in a nursing mother and will, therefore, determine how satisfied the baby's needs are. Try to take a nap each day." S. Cherry, Understanding Pregnancy & Childbirth (1973) at 137.

See also the affidavit of obstetrician Dr. Philip Goldstein submitted by appellees, which acknowledges the modern trend in medicine to treat the family unit. (A.38).

Moreover, pregnancy often results in a resignation from employment. Unlike illness or injury, pregnancy and childbirth are often viewed by women employees as a logical point at which to terminate their jobs. The experience of private disability insurance plans is that 50% of women who take leave from employment for childbearing do not return to work. In comparison, the non-return rate of those who recover from an illness or injury may be less than 1%.[26] If these statistics are valid for the California work force, about half of the benefits paid for normal pregnancy would not carry out the basic objective of the U.I.C.—to provide a bridge between periods of gainful employment—and would constitute "severance" pay or "early retirement."[27]

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26. Testimony of Paul Jackson, actuary for The Wyatt Co., expert witness for defendants in the trial of *Gilbert v. General Electric Co.*, No. 142-72-R (E.D. Va., July 25, 1973). Approximately the same percentage was disclosed by a survey of sickness and accident disability leaves and maternity leaves at Illinois Bell Tel. Co., Brief of American Telephone and Telegraph Co., amicus curiae herein.

27. The federal agencies charged with elimination of sex discrimination in compensation have recognized the unique nature of pregnancy-related absences for employment purposes. The Wage and Hour Administrator has determined that "payments related to maternity" are not wages to be compared for purposes of the Equal Pay Act [29 U.S.C. § 206(d)]. 29 C.F.R. § 800.110. This interpretation is currently followed by the Office of Federal Contract Compliance for purposes of Executive Order 11246, as amended. Thus, while federal contractors must provide reasonable leave for childbearing, "There is no requirement that an employee be paid during the absence." Memorandum of John L. Wilkes, Director, OFCC, to Agency Heads (Nov. 12, 1970) at 5. But *see* 38 Fed. Reg. 35336-35338, Dec. 27, 1973. While the Equal Employment Opportunity Commission currently takes a contrary position in construing Title VII of the Civil Rights Act [42 U.S.C. §§ 2000e *et seq.*], it initially and repeatedly held that pregnancy need not be covered under a sickness and accident disability plan. *See, e.g.*, Gen. Coun. Opinion Letter, Nov. 10, 1966, CCH Empl. Prac. Guide ¶ 17,304.49 (1966); Case No. LA-68-4-538E, CCH EEOC Dec. ¶ 6125 (June 16, 1969); Decision No. 71-308, CCH EEOC Dec. ¶ 6170 (Sept. 17, 1970). It is the initial and consistent EEOC positions which are entitled to judicial deference. Udall

Recognizing pregnancy as a unique condition, this Court,[28] as well as other federal courts[29] and administrative agencies,[30] have considered questions involving the employment opportunities of pregnant employees without reference to the treatment accorded to those disabled by illness or injury.

Even the most outspoken advocates of political and economic rights of women, who have supported the proposed Equal Rights Amendment to the United States Constitution, have recognized that equality does not mean sameness.[31] For example, a memorandum of the Citizens' Advisory Council on the Status of Women, entitled "The Pro-

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v. Tallman, 280 U.S. 1 (1964). *See* Espinoza v. Farah Mfg. Co., 94 S.Ct. 334 (1973), where this Court noted a prior inconsistent EEOC position, in refusing to follow a position taken in the current EEOC Guidelines. *See* discussion in California's brief as amicus curiae in *La Fleur, supra* at 8-12.

28. The opinion of the Court in *La Fleur* nowhere compares the school board's policies regarding employees absent from work for other causes. Rather, the Court invalidated the fixed termination requirements and one of the two return policies on due process grounds.

29. Newmon v. Delta Air Lines, Inc., ... F. Supp. ..... (N.D. Ga. 1973), Daily Labor Report No. 18 at F-1 (Jan. 25, 1974). In this Title VII action the court held, consistent with this Court's recent decision in *La Fleur*, that mandatory leave policies violated the Act. However, recognizing that pregnancy is neither a sickness or a disability, it held that the employer was not required to provide disability benefits. *But see* Wetzel v. Liberty Mutual Insurance Co., Civ. No. 72-169 (W.D. Pa., Jan. 9, 1974).

30. *E.g.*, the Office of Federal Contract Compliance Sex Discrimination Guidelines requires government contractors to recognize childbearing as justification for a leave of absence for a reasonable period of time, even if the employer has no leave policy for other employees. 41 C.F.R. § 60-20.3(g)(2).

31. *See* Jefferson v. Hackney, quoted *infra* at 21. In *James v. Valtierra*, 402 U.S. 137 (1971), the Court rejected an equal protection challenge to a California requirement of referendum approval prior to the construction of low-rent housing projects in any community. The Court observed that "of course a lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection." 402 U.S. at 142.

posed Equal Rights Amendment to the United States Constitution" (1970), contains the following discussion:

> "4. *Laws Which Could Not Possibly Apply to Both Sexes Because of the Difference in Reproductive Capacity.*
>
> Laws which, as a practical matter, can apply to only one sex no matter how they are phrased, *such as laws providing maternity benefits* and laws prohibiting rape, would not be affected by the amendment. The extension of these laws to both sexes would be purely academic, since such laws would not apply differently if they were phrased in terms of both sexes. In these situations, the terminology of sex identification is of no consequence." P. 13 (emphasis added).

The legislative history of the proposed Equal Rights Amendment is consistent:

> "The legal principle underlying the Equal Rights Amendment (H.J. Res. 208) is that the law must deal with the individual attributes of the particular person and not with stereotypes of over-classification based on sex. However, the original resolution does not require that women must be treated in all respects the same as men. *Equality does not mean sameness.* As a result, the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex. For example a law providing for payment of the *medical costs of child bearing* could only apply to women. In contrast, if a particular characteristic is found among members of both sexes, then under the proposed amendment it is not the sex factor but the individual factor which should be determinative." S. Rep. No. 92-689, p. 12 (emphasis added).

The court below recognized that "Pregnancy is clearly a unique human condition. . . ."[32] 359 F. Supp. at 796. How-

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32. The court misspoke: pregnancy is a unique *female* condition.

ever, it failed to appreciate the implications of this observation for its equal protection analysis. Without "similarly circumstanced" workers who receive benefits, there is no basis for an equal protection claim.[33] The discussion above demonstrates that both pregnancy, and absences from work related to pregnancy, are significantly different from illness and injury disabilities. These differences fully justify the difference in treatment accorded by the U.I.C.

III. The U.I.C. is Nondiscriminatory in Both Purpose and Effect.

There are other fundamental defects in the conclusion of the court below that the disability insurance program denies equal protection, in addition to the absence of persons similarly circumstanced. The record contains no suggestion that the U.I.C. was drawn with the intention of discriminating against women. The absence of discriminatory purpose deprives the present case of any similarity to *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), on which the court below relied.[34] In *Shapiro* the avowed purpose of the minimum residency requirement for state public assistance was to limit interstate mobility of needy people—an object prohibited by the Constitution. However, in cases involving state welfare programs where classifications have been drawn according to rational priorities, the Court has re-

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33. *Compare* Reed v. Reed, 404 U.S. 71 (1971), where a State statute created a preference for males over females of the same degree of relationship in administering decedents' estates; Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971), a Title VII case where the employer refused to hire women but not men with small children.

34. The Court below made no effort to reconcile its reliance on *Shapiro* with footnote 10 from that case, which says: "We are not dealing here with state insurance programs which may legitimately tie the amounts of benefits to the individual's contributions" 394 U.S. at 633.

See U.I.C. section 2653 which does tie the amount of benefits payable to the amount of contributions made in the base period.

jected arguments based on statistical disparity or alleged discriminatory effect. In *Jefferson v. Hackney*, 406 U.S. 535 (1972), the Court rejected an alleged denial of equal protection based on the larger percentage of Negroes and Mexican-Americans in certain State aid categories which received a lower level of funding:

> "The acceptance of appellants' constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be. Few legislative efforts to deal with the difficult problems posed by current welfare programs could survive such scrutiny, and we do not find it required by the Fourteenth Amendment." 406 U.S. at 548-49.

The grant categories in *Jefferson* provided higher payments to the aged and infirm than to families with dependent children. The Court found this difference rational:

> "Since budgetary constraints do not allow the payment of the full standard of need for all welfare recipients, the State *may have concluded* that the aged and infirm are the least able of the categorical grant recipients to bear the hardships of an inadequate standard of living." (Emphasis added.)[35]

Certainly, then, it is reasonable for California to conclude that families, with the opportunity to anticipate and plan

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35. 406 U.S. at 549. Finding that the variation in payments to grant classifications was rationally related to a legitimate State purpose, the Court held that the "decision in Griggs v. Duke Power Co., 401 U.S. 424 (1971), is therefore inapposite. In *Griggs*, the employment tests having racially discriminatory effects were found not to be job-related, and for that reason were impermissible under the specific language of Title VII of the Civil Rights Act. Since the Texas procedure challenged here *is* related to the purpose of the welfare programs, it is not proscribed by Title VI simply because of variances in the racial composition of the different categorical programs." 406 U.S. at 550.

for the expenses of normal pregnancy, are less seriously in need of State assistance than individuals who are unexpectedly disabled by illness or injury.

Even if discriminatory effect is relevant in the present case, the undisputed facts will not permit an argument that the disability insurance program discriminates against women. As Judge Williams noted in his dissenting opinion, "Women contribute only 28% of withholdings but draw 39% of the benefit payments. Put another way, men receive $.89 per dollar contributed while women receive $1.37 per dollar contributed." 359 F.Supp. at 802 n. 1.

These figures quoted by Judge Williams were based upon data furnished by appellant from his agency's 1971 experience administering the disability insurance fund. The 1972 experience showed men receiving $.80 per dollar contributed while women received $1.27 per dollar contributed. Appellant estimates, based on claims received to date, that adding pregnancy complications would result in women receiving $1.31 per dollar contributed. If normal pregnancy is included as well, the disparity becomes truly dramatic: women would receive $2.33 per dollar contributed, compared to $.80 for men.[36] Appellant submitted other actuarial data based on his agency's experience which showed that *in every age group* the ratio of cost to contributions for female workers is significantly greater than for men.[37] This disparity is not unique to appellant's program but is a well-known and well-documented actuarial difference between the health and disability experiences of men and women. Appellant submitted data from the "Report of Mortality and Morbidity" published annually by the Society of Actuaries, which showed that both the annual claim rate and the annual claim

36. Affidavit of Carl Peterson, Exhibit D to Application for Stay.

37. Affidavit of William D. Smith, A.47.

cost are significantly greater for females than for males.[38] These facts further substantiate a legislative decision to structure the disability program in a fashion which would prevent a greater distortion in the share of benefits available to men and women.

This Court's decision in *LaFleur* recognizes the unique nature of pregnancy-related absences from work, in considering the regulation of school maternity leave policies as a question of Fourteenth Amendment due process, even though the parties and the courts below had framed the issue as one of equal protection. The Court held that the maternity leave policies of two school districts denied due process by establishing irrebuttable presumptions of disability, which encroached on constitutionally protected rights. Using an analysis very like that employed in the context of equal protection, the Court considered both the validity of the State interests asserted and their relationship to the maternity leave policies. The Court accepted the two State interests as legitimate: (1) "preserving con-

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38. Affidavit of William Smith, A.47.

See also July 13, 1973 Statement of Herbert Denenberg, Insurance Commissioner of Pennsylvania, before the Joint Economic Committee of Congress. Hearings on the Economic Problems of Women, published by The Bureau of National Affairs, Inc: "Disability coverage poses a more difficult problem as the loss experience of women, even with pregnancy costs excluded, may run two and a half times higher than for men."

The pattern of female benefits advantage, excluding benefits for normal pregnancy, is further demonstrated through data compiled by the American Telephone and Telegraph Co. In addition to showing that women lose more days to disabilities than men, these data demonstrate that in 16 of 17 categories of compensated disabilities the disability frequency rate is higher for women than men. *See* Brief of the American Telephone and Telegraph Co. as amicus curiae.

See also Brief of General Electric Company as amicus curiae, whose experience shows an average sickness and accident benefit cost for women which is twice that for men.

tinuity of instruction,"[39] and (2) "keeping physically unfit teachers out of the classroom."[40] However, it concluded that the respective policies requiring termination in the fifth and sixth month of pregnancy, as well as the policy of one district barring re-employment until the newborn child is three months old, were not rationally related to either objective.

In contrast, the U.I.C. makes no presumptions regarding pregnancy. It merely defines the scope of disability benefits consistently with its legitimate objectives. This definition is not based on unwarranted presumptions or stereotypes, but rather on the substantial differences between normal pregnancy and illness and injury disabilities discussed above.[41]

In any event, the analysis of the Court in *LaFleur* may not be relied on to support the decision below since the U.I.C. does not impinge on a constitutionally protected right. The Court in *La Fleur* was properly concerned for the substantial adverse impact the maternity policies had on the constitutionally protected right to bear children. However, the Court has recognized a fundamental distinction between governmental encroachment on private decisions involving matters of marriage and family life,[42] and the discretion of the government in determining the alloca-

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39. Slip opinion at 10.

40. *Id.* at 10-11.

41. Contrary to the presumption of the rules involved in *La Fleur*, the Court found that, "the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter." Slip opinion at 12. *Compare* Reed v. Reed, 404 U.S. at 75, where the Court recognized the immutable fact of differing longevity between the sexes.

42. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Loving v. Virginia, 338 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

tion of limited resources in economic welfare programs. In *Dandridge v. Williams, supra,* the Court rejected a claim by plaintiffs with large families that the ceiling placed by Maryland on welfare benefits violated equal protection requirements. The program was not viewed as an intrusion by the government into the protected sphere of private decision regarding procreation, even though one justification for the ceiling relied on by Maryland was "providing incentives for family planning." 397 U.S. at 484. As Justice Powell observed, concurring in *La Fleur*:

> These regulations undoubtedly add to the burdens of childbearing. But certainly not every government policy that burdens childbearing violates the Constitution. Limitations on the welfare benefits a family may receive that do not take into account the size of the family illustrate this point. *See Dandridge v. Williams,* 397 U.S. 471 (1970). Undoubtedly Congress could, as another example, constitutionally seek to discourage excessive population growth by limiting tax deductions for dependents. That would represent an intentional governmental effort to "penalize" childbearing. See *ante.* at 7. The regulations here do not have that purpose. Their deterrent impact is wholly incidental. If some intentional efforts to penalize childbearing are constitutional, and if *Dandridge, supra,* means what I think it does, then certainly these regulations are not invalid as an infringement of any right to procreate. Slip opinion at 1-2.[43]

IV. Mandating Coverage of Normal Pregnancy Would Defeat Legitimate State Objectives Embodied in the U.I.C.

As the history of the U.I.C. demonstrates, the purposes of the legislature in choosing not to include benefits for

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43. Even the question of the legality of the regulations in *La Fleur* was viewed as one of degree, with the Court expressing no view as to a narrower limitation requiring termination at a fixed date "during the last few weeks of pregnancy." Slip opinion at 14 n.13.

pregnancy have been clear from the outset. They are in not the sort of after-the-fact rationale presented to the Court in *LaFleur*.[44] As discussed more fully above, these objectives are:

1. To provide partial income replacement during the interim period workers are forced to be absent from work due to illness or injury;

2. To create a self-sustaining fund which would not draw upon other state resources;

3. To retain a maximum 1% employee contribution which would afford less expensive protection than private insurance programs; and

4. Not to establish an incidental, yet fiscally prohibitive, maternity benefit plan.

The preceding discussion has demonstrated that, in terms of the prior decisions of this Court, these objectives are undeniably legitimate; that they may appropriately be furthered by recognizing pregnancy as a condition unlike illness and injury; and that the U.I.C. is without discriminatory purpose or effect. The following discussion further demonstrates that, unlike the leave policies in *La Fleur*, the choice made by the legislature is rationally related to its legitimate objectives.

A. THE COST OF COVERING NORMAL PREGNANCY UNDER THE U.I.C. IS SUBSTANTIAL.

The current annual cost of the disability plan is approximately $362.1 million, exclusive of pregnancy. This level of benefit payments results in an almost total utilization of the 1% contribution from employees' salaries. The State introduced uncontroverted evidence in the court below indi-

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44. *See* slip opinion at 8 n. 9, and concurring opinion of Justice Powell at 3.

cating that the cost of covering pregnancy would be an additional $120.2 million, based on a thirteen-week duration.[45] The claims received by the State since the decision below have *averaged* fifteen weeks in duration and indicate that this original estimate was overly conservative. The revised estimate called for by actual experience indicates an increase in costs of $131 million, 36% over the present level of claims paid.[46] Thus with the inclusion of benefits for normal pregnancy, the total amount of claims paid would rise to $493.1 million, which is more than $100 million above the annual income of the fund.

In addition to the regular weekly benefit, the disability plan provides a hospital benefit of $12 per day.[47] Moreover, hospitalization results in a waiver of the seven-day exclusionary period. Since virtually every pregnancy in California involves hospitalization, coverage of normal pregnancy would add an average of 4 days of hospital benefits for each employee as well as an extra week of disability benefits.[48]

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45. 359 F.Supp. at 802 n.2 (Williams, J., dissenting).

46. Affidavit of Carl Peterson, Exhibit D to Application for Stay.

47. U.I.C. § 2801.

48. Obstetrical conditions account for a third of patients hospitalized in the age group 15-44, with a rate of 501.0 discharges per 10,000 population in 1971. *See* "Monthly Vital Statistics Report-Hospital Discharge Survey," U.S. Department of Health, Education and Welfare, Vol. 22, No. 6, Sept. 14, 1973, p. 3.

It should be recognized that hospitalization in the case of pregnancy, unlike confinement resulting from illness or injury, is generally prescribed for the convenience of the doctor and as a precaution against complication, particularly complications involving the newborn infant. *See* testimony of Dr. Andre Hellegers, summarized in Brief of General Electric Company, amicus curiae that "overwhelmingly" the physician is present during delivery as "a prevention of complications," rather than as a "primary requirement." Labor, he testified, "in itself does not require medical assistance . . . there is really nothing that the doctor does in labor except hold hands and rub backs and encourage, . . ."

When the U.I.C. was initially adopted, the State was well aware of these cost implications, based on the experience of the Rhode Island program. While appellees introduced no evidence on the question of cost in the court below, in their Motion to Affirm in this Court, they contend that the Rhode Island experience was based on poor control of claims.[49] There is no reason to believe California can control these claims any more effectively than did Rhode Island. As the Court recognized in *LaFleur*, medical opinion provides no reassurance:

> [*D*]*espite the plethora of conflicting medical testimony in these cases,* we can assume *arguendo* that at least some teachers become physically disabled from effectively performing their duties during the latter stages of pregnancy.[50] (Emphasis added.)

That doctors disagree sharply on the duration and severity of pregnancy disability is further confirmed in a survey conducted by Dr. Allan Treat, Medical Director of the California Department of Human Resources Development following the decision below. This survey, attached hereto as Appendix A, elicited widely divergent opinions from prominent obstetrical practitioners in California. Because of the lack of a consensus of medical opinion, appellant would find it impossible to develop a norm against which to measure claims presented. Thus, not only will pregnancy claims be the largest class of claims received, it will also include an estimate of duration which is more generous than for other disabilities and which in many cases will be based on considerations affecting infant well-being, rather than maternal disability, from which no conscientious medical practitioner can possibly divorce himself. That physi-

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49. Motion to Affirm at 15 n.13.

50. Slip opinion at 11.

cians are acutely sensitive to the welfare of both mother *and child* and can be expected to certify liberally claims of disability[51] is amply demonstrated by the claims received to date, which indicate that the State had underestimated rather than overestimated claims potential.[52] Certainly this case presents a dramatically different situation from the cases in which this Court has rejected defenses to constitutional challenges based on *speculative* cost justification.[53]

2. MODIFICATIONS OF THE PROGRAM TO PROVIDE COVERAGE OF NORMAL PREGNANCY ARE INCONSISTENT WITH LEGITIMATE STATE INTERESTS.

The court below recognized the legitimacy of the state interest in preserving "the fiscal integrity of its program," as well as its interest in making the program "self-sustaining and paid for by those who use it rather than by tax revenues drawn from the public at large." 359 F. Supp. at 798. Nonetheless, it refused to give effect to these interests, apparently because it concluded that the coverage of normal pregnancy "would not destroy the program." *Id.* The court further stated:

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51. *See, generally,* S. Cherry, Understanding Pregnancy & Childbirth (1973).

52. One proponent of mandatory disability benefits for pregnancy has estimated that such benefits would increase per-employee benefit costs by 17.6%. Remarks of J. Gutwillig, Chairperson, Citizens Advisory Council on the Status of Women, to the American Hospital Ass'n on "Job-Related Maternity Benefits" (July 27, 1972). Even this very conservative estimate, which assumes a maximum disability period of six weeks, would exceed annual U.I.C. income by over $50 million.

53. *See, e.g., Frontiero v. Richardson,* 411 U.S. 677 (1973), where the plurality opinion noted: "The Government offers no concrete evidence, however, tending to support its view that such treatment [presuming dependency of spouse of serviceman while imposing support test for servicewoman's spouse to qualify for benefits] in fact saves the Government any money."

> [T]he entire cost increase estimated by defendant could be met by requiring workers to contribute an additional amount of approximately .364 percent of their salary and increasing the maximum annual contribution to about $119. 359 F.Supp. at 798.

This observation ignores the equally important State objective of strictly limiting the amount employees will be required to contribute to support the plan. This Court has repeatedly recognized that a State has the discretion to determine the resources it will commit to social welfare programs.[54] California has exercised its discretion by fixing and maintaining the low-cost and easy-to-compute 1% rate of employee contributions. California has never seriously considered an increase in that rate, as suggested by the court.[55]

Alternatively, the court below suggested that the fiscal integrity of the fund could be protected by a general reduction in benefit levels. Thus the State would be required to reduce by 36 percent benefits generally available to men and women as protection against disabling illness and injury, in order to provide benefits for normal pregnancy. This would impose the greatest burden on those most severely disabled and most in need, in direct contradiction of the purpose of the legislation, which as Judge Williams observed, is:

---

54. Clearly the adoption of any social welfare program does not result in an open-ended commitment of state funds. *See Jefferson v. Hackney, supra; Dandridge v. Williams, supra.*

55. Cal. Unemp. Ins. Code § 2604 authorizes the director of the program (with approval of the Governor) to forestall an emergency insolvency by altering the scale of benefits or increasing the waiting time for benefits. However the power to increase the contribution rate is retained exclusively by the legislature. 359 F. Supp. at 804 (Williams, J., dissenting). *See* note 3 *supra.*

"To protect against workers' loss of income by providing the broadest coverage and maximum benefits available within the limit of funds generated by a 1% contribution. . . . In each instance when the 1% contribution rate generated a surplus the legislature chose to spread it across the entire work force (including women in plaintiffs' claimed class) in the form of increased benefits rather than for financing the removal of the limitations on liability here under attack." 359 F. Supp. at 803-805.

This court has held that a State may lawfully prefer the aged and the infirm to families with dependent children in the benefit scheme of welfare legislation.[56] Surely then the State is competent to determine that limited funds derived from all workers should be used to provide broad protection to all workers, male and female, against *illness* and *injury* disabilities, rather than to provide maternity benefits for normal pregnancy. This is particularly reasonable since the U.I.C., as presently constituted provides benefits for abnormal and complicated pregnancy and affords female workers a substantial advantage in the benefits presently paid.

The district court is factually incorrect in asserting that the coverage of normal pregnancy would not destroy the program. Indeed, its order creates a new welfare program for the State of California which is radically different from the U.I.C. Under this program 36% of all benefits will be devoted exclusively to benefits for normal pregnancy, and concentrated in the hands of the approximately 5% of female workers who are pregnant each year.[57] Since normal

---

56. *Jefferson v. Hackney, supra.*

57. Approximately 5.3% of female employees covered by the Federal Railway Unemployment Insurance Act have received maternity benefits each year between 1947-52. Women's Bureau, U.S. Dept. of Labor, "Maternity Protection of Employed Women,"

pregnancy constitutes by far the largest single category of disability benefits, it would result in a truely dramatic benefit advantage for female workers. Further, it may be expected that half of these maternity benefits, or 18% of all U.I.C. benefits, would constitute "severance" or "early retirement" pay for workers who end rather than interrupt their employment. In effect, the court below holds that, by establishing a program to minimize the economic impact on workers of disabling illness and injury, the State has obligated itself to something quite different.[58]

However, this Court has correctly held that the superlegislative role assumed by the court below is neither required nor authorized by the Constitution:

> Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure. . . . But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration. . . . But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients. (*Dandridge v. Williams, supra* at 487.)

Bulletin No. 240 at 5 (1952). Approximately the same results were obtained in a 1972 survey of maternity leaves at eight Bell Telephone Companies. Brief of American Telephone and Telegraph Co., amicus curiae.

58. The court below has deprived the State of the opportunity to consider an important question of policy—whether all workers should be required to subsidize childbirth. This issue involves consideration of the proper role of government in supporting or encouraging population growth, which was not involved in the disability insurance program as adopted. *Cf. Dandridge v. Williams*, and concurring opinion of Justice Powell in LaFleur discussed *supra* at 26-27.

CONCLUSION

Appellant submits that when the factors discussed above are weighed together: the legitimacy of the State's objectives in establishing the disability insurance program; the rationality of treating normal pregnancy as different from illness or injury, and the necessity of treating such a high-cost and high-frequency item differently in order to preserve the solvency of the fund, it becomes clear that California has not exceeded its discretion in allocating limited resources in a manner best calculated to alleviate the social ills attendant upon unexpected illness or injury disability. The court below erred in holding the rationally-related classifications created by California to be a denial of equal protection.

The decision of the court below should, therefore, be reversed and remanded, with the direction that appellees' complaint be dismissed.

Dated February 6, 1974.

Respectfully submitted,

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Assistant Attorney General

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Attorneys for Appellant State of California

FILE COPY

In the Supreme Court of the United States

Supreme Court, U.
FILED
FEB 9 1974
MICHAEL RODAK, JR., C

OCTOBER TERM, 1973

No. 73-640

DWIGHT GEDULDIG,

Appellant,

v.

CAROLYN AIELLO, individually and on behalf of all others similarly situated,

Appellees.

DWIGHT GEDULDIG,

Appellant,

v.

AUGUSTINA D. ARMENDARIZ, ELIZABETH B. JOHNSON, JACQUELINE JARAMILLO, individually and on behalf of all other women similarly situated,

Appellees.

CONSOLIDATED CASES ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Appendix to Brief for Appellant

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Appendix

AFFIDAVIT

State of California
County of Sacramento—ss.

I, D. ALLEN TREAT, M.D., declare that I am the Medical Director for the Employment Development Department (formerly Department of Human Resources Development), State of California. As such, I am responsible for overseeing all medical aspects of the Department's various programs. I have held my current position since May 1, 1970.

After the decision of the United States District Court for the Northern District of California in the case of AIELLO, et al. v. HANSEN (now before the United States Supreme Court as GEDULDIG v. AIELLO, et al.), I began a survey of obstetricians and gynecologists to ascertain their estimates of the duration of possible disability caused by pregnancy. A letter and questionnaire (attached hereto as Exhibit A) were mailed to sixty doctors who are professors of obstetrics and gynecology at California medical schools, obstetricians certified by the American Board of Obstetrics and Gynecology or independent medical examiners on the medical review panel of the Department. Responses were received from 61% of those solicited. Attached hereto as Exhibits B, C, and D, are summaries of the survey results, by category of practitioner, which show a total lack of agreement among experts in the medical teaching field and in medical practice on the expected duration of pregnancy disability. The answers of the medical school professors (assuming sedentary or light occupations) for the pre- and postpartum period of disability ranged from a minimum 2-3 weeks to 15 weeks. The answers of the American Board certified obstetricians ranged from none to 13 weeks. The answers of the independent medical examiners varied from 4 days to 13 weeks.

Several doctors who responded added comments such as "There is a good deal of variation among patients," "would require individual assessment of each case" or "can vary tremendously." Attempts to apply our usual administrative procedures were hampered by the lack of any known clinical consensus on the subject, owing to the tendency of doctors to treat the maternity patient individually. Consequently, we have been unable to establish "normal expectancy" yardsticks of disability duration of the kind we customarily use in connection with illness or injury.

/s/ D. ALLEN TREAT, M.D.
D. Allen Treat, M.D.

Subscribed and sworn to before me this
1st day of February, 1974.

/s/ SYDNEY R. JOHNSON
Notary Public in and for said
County and State

My Commission expires Feb. 27, 1977

EXHIBIT A

DEPARTMENT OF HUMAN RESOURCES
DEVELOPMENT [Letterhead]
800 Capitol Mall
SACRAMENTO 95814

REFER TO:

You may have read newspaper accounts of recent State and Federal Court cases involving pregnancy and our California Disability Insurance program. Although there are still pending some legal points concerning the extent to which the program will be required to pay for pregnancy-related disability, we do need expert advice on the medical aspect of routine maternity care with normal delivery and its possible relationship to "disability". Please give us whatever assistance you can. (If you want your opinion to be treated as confidential, I assure you that your wish will be respected.)

Unlike private medical insurance plans with optional maternity benefits (expensive because of the high risk) our disability insurance is designed to cover the risk of any wage loss resulting from a non-industrial, medically certified "illness" or "injury". To be eligible for benefits from the Disability Fund formed exclusively from employees' money, the insured individual must:

(1) Be unable to perform his regular or customary work,
(2) Be disabled by a medical illness or injury supported by the certificate signed by his treating clinician, and
(3) File a timely claim for these payments to offset his wage loss.

These basic requirements apply without discrimination to all claimants, including pregnant women who may be medically disabled for work. There must be the same documentation of severity, and medical justification for the duration of disability in claims involving pregnancy as in claims for non-pregnancy related conditions. In general, the average maternity case receiving routine prenatal care is considered to be not pathological. Many pregnant women covered by our UI/DI insurance program, and receiving routine maternity care, declare themselves to be "able", and are so certified medically. Such individuals have customarily been paid Unemployment Insurance benefits (not disability).

However, there may be a relatively short period of time preceding, during and following the usual delivery when the gravid patient would not be able to work. The length of time could vary in accordance with the environment or physical demands of different occupations (see enclosed listing).

What is a *reasonable duration* for this period of maternal disability due to only an average pregnancy with normal delivery? We would greatly appreciate your help in formulating future medical guidelines that can be used by our professional staff.

Enclosed with the form to be returned is a self-addressed, stamped envelope for your convenience.

Very truly yours,

D. Allen Treat, M.D.
Medical Director

Encl.

PRELIMINARY SURVEY OF PROFESSIONAL OPINION

Occupation Duration of Maternal Disability [In Days or Weeks]

[See Listing Job Demands]	Pre Partum	Delivery	Post Partum	Total
Sedentary				
Light				
Medium				
Heavy				

Additional Information, Remarks, and Comments:

Name[s] of Contributor[s] Date

Please return this form to:

Medical Director, HRD
800 Capitol Mall
Sacramento, CA 95814

THE PHYSICAL JOB DEMANDS ON WOMEN WORKERS

S Sedentary Work

A *sedentary* job is one involving mostly sitting, plus occasional standing/walking as needed, and the lifting/carrying of objects under 10 pounds.

Example: Assembler [line], bookkeeper, cashier, office worker, telephone worker.

L Light Work

A *light* job requires significant walking/standing, or strenuous use of arms/legs while sitting, plus lifting/carrying 10 pounds frequently or occasional maximum of 20 pounds.

Example: Airplane stewardess, cannery worker, hair dresser, laundry presser, poultry dresser, sales clerk, waitress.

M Medium Work

A *medium* job has physical demands similar to above "light" but with frequent 25 pounds use and maximum of 50 pounds.

Example: Grocerychecker, general duty nurse, LVN, produce packer, restaurant cook or helper.

H Heavy Work

A *heavy* job involves frequent lifting/carrying objects of 50 pounds, and maximum of 100 pounds. Work with weight demands in excess of these limits is "very heavy" job.

Example: Charwoman, farm hand picker, stage grip, welder.

EXHIBIT B

DEPARTMENT OF HUMAN RESOURCES
DEVELOPMENT [Letterhead]
800 Capitol Mall
SACRAMENTO 95814

September 26, 1973

REFER TO:
31:1:em

Robert Creasy, M.D.
Associate Professor
Department of OB/GYN
University of California Hospital
3rd & Parnassus
San Francisco, Ca 94122

Dear Dr. Creasy:

Thank you for your response to our preliminary survey of expert opinion on the question of reasonable duration of inability to work due to usual maternity care with normal delivery. For Sedentary and Light Occupations you estimated that such nonpathological gravid employees would be unable to work for a *total* pre and postpartum period averaging 2-3 weeks.

You may be interested to know how your expert view compares with that expressed by your professional peer group representing other California Medical Schools. For Seden-

tary and Light Occupations the total pre and postpartum period of disability was professionally estimated to be:*

2-3 weeks
4 weeks
3-6 weeks
6 weeks
6-8 weeks
8-9 weeks
10 weeks
15 weeks

We appreciate the help you have given us. If there is anything that we can do for you, please do not hesitate to ask.

Very truly yours,

D. Allen Treat, M.D.
Medical Director

*Note: Each line of the tabulation represents one response.

EXHIBIT C

DEPARTMENT OF HUMAN RESOURCES
DEVELOPMENT [Letterhead]
800 Capitol Mall
SACRAMENTO 95814

December 28, 1973

REFER TO:
31:1:em

Mary Lou Judy, M.D.
1111 University
Menlo Park, Ca 94025

Dear Dr. Judy:

Thank you for your response to our preliminary survey of expert opinion on the question of reasonable duration of inability to work due to usual maternity care with normal delivery. For Sedentary and Light Occupations you estimated that such nonpathological gravid employees would be unable to work for a *total* pre and postpartum period averaging one month.

You may be interested to know how your expert view compares with that expressed by your specialized peer group representing other American Board Certified Obstetricians. For Sedentary and Light Occupations the total pre

and postpartum period of disability was professionally estimated to be:*

None to last trimester (12 weeks)
One month
4-8 weeks
6-8 weeks
6-10 weeks
7-9 weeks
8-10 weeks
9-11 weeks
9-13 weeks
Ten weeks
10-11 weeks
10-12 weeks
Eleven weeks

We appreciate the help you have given us. If there is anything that we can do for you, please do not hesitate to ask.

Very truly yours,

D. Allen Treat, M.D.
Medical Director

*Note: Each line of the tabulation represents one response.

EXHIBIT D

DEPARTMENT OF HUMAN RESOURCES
DEVELOPMENT [Letterhead]
800 Capitol Mall
SACRAMENTO 95814

December 27, 1973

REFER TO:
31:1:em

Stephen L. Saukerson, M.D.
3289 Janes Road
Arcata, Ca 95521

Dear Dr. Saukerson:

Thank you for your response to our preliminary survey of expert opinion on the question of reasonable duration of inability to work due to usual maternity care with normal delivery. For Sedentary and Light Occupations you estimated that such nonpathological gravid employees would be unable to work for a *total* pre and postpartum period averaging 4 days (half a week).

You may be interested to know how your expert view compares with that expressed by your clinical peer group representing other Independent Medical Examiners for State D.I. For Sedentary and Light Occupations the total

pre and postpartum period of disability was professionally estimated to be:*

4 days (half a week)
Three weeks
3-10 weeks
4-11 weeks
4.5 weeks
4.5-6 weeks
six weeks (three such estimates)
8-10 weeks (three such estimates)
8-12 weeks
9-13 weeks

We appreciate the help you have given us. If there is anything that we can do for you, please do not hesitate to ask.

Very truly yours,

D. Allen Treat, M.D.
Medical Director

*Note: Each line of the tabulation represents one response.

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IN THE

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OCTOBER TERM, 1973

No. 73-640

DWIGHT GEDULDIG,
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CAROLYN AIELLO,
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AUGUSTINA D. ARMENDARIZ, ET AL.,
Individually and on Behalf of All
Other Women Similarly Situated,
Appellees,

Consolidated Cases on Appeal from the United States District Court for the Northern District of California

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BRIEF FOR GENERAL ELECTRIC COMPANY, AS AMICUS CURIAE

This brief *amicus curiae* is filed by General Electric Company with the consent of all parties,[1] as provided for in Rule 42 of the Rules of this Court.

INTEREST OF GENERAL ELECTRIC COMPANY

General Electric Company (hereinafter "GE") is engaged in the manufacture of industrial electrical equipment, products for national defense, consumer electrical appliances, electronic equipment, medical equipment, jet engines, and in addition, an almost endless array of electrical items and machinery. GE has over 250 manufacturing plants located in some 33 states and territories of the United States. It is one of the largest employers in the United States, employing more than 310,000 persons.

GE employees, of whom approximately 85,000 are females, are covered by non-occupational sickness and accident insurance which provides them with weekly income maintenance benefits for total disability resulting from non-occupational sickness or accidents. Benefit payments under such insurance are not payable, however, for any absence from work due to pregnancy or childbirth or to complications in connection therewith.

GE is the defendant in a civil suit presently pending in the United States District Court for the Eastern District of Virginia, Richmond Division (*Gilbert, et al., Plaintiffs*, v. *General Electric Company, Defendant*, No. 142-72-R), in which issues have been raised analogous to those in the case before the Court.

---

[1] Letters consenting to the filing of this brief have been filed with the Clerk of the Court.

The amended complaint in the suit, which the District Court has allowed to proceed as a class action on behalf of GE female employees, alleges in substance that GE, in violation of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e, *et seq.*), has discriminated, and is discriminating, against its female employees because of their sex by maintaining in effect the above-described sickness and accident insurance with the indicated pregnancy exclusion, and by denying benefits thereunder to female employees for absences from work resulting from pregnancy or childbirth. Plaintiffs in the suit are seeking, *inter alia*, an injunction requiring the elimination of the pregnancy exclusion from GE's sickness and accident insurance coverage, and monetary damages. Trial of the suit was held in July 1973. It is anticipated that the District Court will issue a decision shortly.

Title VII of the Civil Rights Act of 1964, as amended in 1972, prohibits most private and public employers from discriminating against any individual in his employment, or from otherwise treating an employee adversely or unfairly, "because of [the] individual's . . . sex" (42 U.S.C. 2000e-2(a)), except "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise" (42 U.S.C. 2000e-2(e)(1)). To implement this statutory prohibition, the Equal Employment Opportunity Commission has published guidelines—upon which we comment below—stating in part that "Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes,

temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment." 29 C.F.R. 1604.10.[2] Thus, although the construction and application of Title VII are not before the Court, the reach of this case must be weighed in the light of the fact that the agency charged with administering Title VII has asserted that a pregnancy exclusion like that here under attack would, if in a private or public employe disability plan, violate the statutory prohibition against sex discrimination. In this connection, it is most significant that

---

[2] The relevant guidelines, in full, are as follows:

"(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of Title VII.

"(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

"(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity."

the Equal Employment Opportunity Commission in fact filed a brief in the court below in support of the instant Appellees. The brief made specific reference to the above-quoted EEOC guidelines on sex, and recited at the outset that the Commission was filing the brief "because it believes the standards the Court should apply in determining the constitutionality of § 2626 of the California Unemployment Insurance Code are similar to the standards which would be applied to the same policy if it were challenged under Title VII of the 1964 Civil Rights Act. . . . The Commission believes that, under both Title VII and the Fourteenth Amendment, a policy denying disability benefits to women workers disabled by pregnancy is illegal sex discrimination." The Commission, moreover, appeared and pressed this point in oral argument before the court below.[3] In sum, although Fourteenth Amendment and Title VII issues do not turn on the same considerations—for example, underlying Congressional intent could be decisive in ascertaining the meaning of Title VII—the likelihood exists that this case may well affect the disposition of related Title VII cases. See the statement to the same effect by Circuit Judge Winter, dissenting in

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[3] See also Memorandum For The United States As Amicus Curiae filed by the Solicitor General in Nos. 72-77 7and 72-1129, *Cleveland Board of Education* v. *La Fleur* and *Cohen* v. *Chesterfield County School Board*, —— U.S. ——, 42 LW 4186 (Jan. 21, 1974). There, in cases which also presented Fourteenth Amendment sex discrimination issues, the Solicitor General stressed the materiality of the relevant EEOC guidelines, and stated, ". . . the Court's resolution of the issue under the Equal Protection or Due Process Clause, while not dispositive may well bear on the validity of the guidelines." Memorandum, p. 2.

Cohen v. *Chesterfield County School Board*, 474 F.2d 395, 399-400 (4th Cir. 1973), decided by this Court on Jan. 21, 1974, —— U.S. ——, 42 LW 4186.[4]

SUMMARY OF ARGUMENT

I

The purpose of sickness and injury insurance is to soften the blow of an unexpected sickness or injury. A rational relationship between the pregnancy exclusion in the California statute and the statute's purpose is shown by the fact that pregnancy is not a sickness; rather it is a voluntarily induced condition.

A. Medical experts who testified in *Gilbert* v. *General Electric Company* (No. 142-72-R, United States District Court for the Eastern District of Virginia, Richmond Division) agreed that pregnancy is not a sickness. Sickness, medically speaking, is an "ab-

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[4] In addition to the *Gilbert* case, *supra*, the following Title VII cases involving disparate treatment of pregnancy in the context of insurance or sick leave plans, are now pending in United States district courts: *Grogg* v. *General Motors Corporation*, No. 73 Civ. 63, S.D. N.Y.; *Communications Workers* v. *Southern Bell Tel. & Tel. Co.*, No. 73-C-959, N.D. Ill.; *E.E.O.C.* v. *E. I. duPont deNemours & Co.*, Civil Action No. 4515, D. Del.

Two district courts have recently passed upon the issue: *Newmon* v. *Delta Air Lines, Inc.*, No. 15,681, N.D. Ga., decided Dec. 31, 1973, and as yet unreported; and *Wetzel* v. *Liberty Mutual Insurance Company*, No. 72-169, W.D. Pa., decided Jan. 9, 1974, and also as yet unreported. In *Newmon*, the court concluded that a Title VII violation had not been shown; the *Wetzel* court reached the opposite conclusion.

normal" or "morbid" condition or process which, if not corrected, leads to further debility and ultimately to death. In contrast, pregnancy, is a "normal, physiological function" or "a normal variant alteration of physiology."

It is accepted medical practice in the United States that pregnant women can continue to be employed at their usual jobs until the onset of labor. Labor, in itself, moreover, does not require medical assistance; physicians are present during labor only to prevent complications. In Europe, where delivery complications and mortality rates are better than in the United States, home deliveries by trained midwives are common. The trend in the United States has been toward hospital-type delivery and care, but the reason for this is in part to assist in helping with child nursing and to provide for the infant's psychological support.

Approximately 10-15 per cent of women have complications associated with pregnancy; but only 1-2 per cent have "major" complications, and of this number only a "very small" percentage require hospitalization.

B. The testimony of the medical experts in the *Gilbert* case also established that pregnancy can be avoided through the use of contraceptive devices which are essentially "foolproof." The pill, commonly regarded in the obstetric community as safer than childbirth, is "virtually a hundred per cent" effective. There are also other medically acceptable methods of contraception: the IUD is one and is presently only a little less effective than the pill; new models of the IUD are even more effective.

The voluntary nature of pregnancy is further shown by the existence of two back-up methods for avoiding pregnancy: abortion—now subject to principles established in *Roe* v. *Wade*, 410 U.S. 179 (1973)—and the "morning after" pill. Abortions are safe and effective; the "morning after" pill has been accepted by the Food and Drug Administration and is quite effective if used properly.

In sum, pregnancy, unlike sickness, injury, or accident, results from a cumulative exercise of free will, which is reflected in decisions to have sexual intercourse, not to use contraceptives, and not to terminate the pregnancy if it occurs. This Court itself recognized, moreover, that pregnancy is the result of deliberate choice. *Cleveland Board of Education* v. *LaFleur*, —— U.S. ——, 42 LW 4186, 4189 (1974).

II

Insurance industry practice demonstrates the rational purpose of the pregnancy exclusion under review by the Court and shows that the exclusion is rationally related to the legislative objective. Expert actuarial testimony in the *Gilbert* case, *supra*, with respect to employer-provided sickness and accident disability insurance in the United States and the treatment of pregnancy thereunder shows that the cost of providing pregnancy coverage is relatively high, and that the insurance underwriting industry has consistently excluded pregnancy from the concept of disability. The insurance industry experience is supported by relevant General Electric Company statistics also adduced in evidence in the *Gilbert* case and reproduced herein.

About 40 per cent of the work force in the United States under age 65, or some 32,168,000 employees, is covered by sickness and accident insurance. But only about 42.6 per cent of the plans, covering about 13,500,000 employees, provide a pregnancy benefit. Where provided, moreover, the pregnancy benefit is almost always limited to six weeks of benefit coverage, contrasting with the fact that 95 per cent of the existing plans provide 13 or 26 weeks benefit coverage for ordinary disabilities. The annual cost of adding maternity benefits to the sickness and accident disability income plans currently in effect in the United States would be $1,353,000,000.

There are features unique to pregnancy claims which, from an actuarial standpoint, increase the relative cost of pregnancy insurance coverage: income loss from pregnancy occurs at a predictable future time, thus inviting claim abuse; pregnancy, unlike most sicknesses and accidents, is within the insured's control; the median duration of a pregnancy claim is 15 weeks, whereas the median duration of ordinary disability claims is two weeks; a mother's concern for her child acts to cause a postponement of her return to work; and the usual control mechanisms employed by the insurance industry to counteract claim abuse and malingering are frequently ineffective where pregnancy coverage is involved. Furthermore, although generally 100 per cent of those employees who recover from short term disabilities actually come back to work, the return rate for females who have babies is only 50 per cent—a fact making the payment of a pregnancy benefit highly inconsistent with the purpose of disability insurance protection which is to protect employee earnings.

There also exists a normal cost and benefit imbalance under sickness and accident disability insurance coverage which markedly favors females over males: under existing insurance plans that do not cover maternity the cost per unit of benefit for a female employee is approximately 170 per cent of that for a male employee. Where maternity benefits are provided, the disproportion in costs between females and males is accentuated.

This Court has ruled that fiscal considerations are legitimate concerns in the area of economics and social welfare when state programs are subject to equal protection scrutiny. See *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970); *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972). See also *Vlandis* v. *Kline*, 412 U.S. 441, 448 (1973), and *O'Gorman & Young* v. *Hartford Fire Ins. Co.*, 282 U.S. 251, 256 (1930).

III

The Congressional legislative history of the Equal Rights Amendment to the Constitution ("ERA") supports the argument that the pregnancy exclusion in the California statute before the Court reflects a reasonable, non-arbitrary, classification. That history shows that the ERA would not prohibit reasonable classifications based on characteristics that are unique to one sex. This was the understanding and view specifically adopted and approved in the pertinent majority Senate Report, and was also the view of the 14 members of the House Committee on the Judiciary who supported the version of the ERA which was ultimately approved by both Houses of Congress.

According to proponents of the ERA who testified in its behalf, the fundamental legal principle underlying the ERA is that a law must deal with the individual attributes of a particular person, and not with an overclassification upon an irrelevant sex factor. However, the ERA would not preclude legislation, or other official action, which relates to physical characteristics unique to one sex. So long as the characteristics are found in all women and no men, or all men and no women, a law predicated upon such characteristics would not violate the basic ERA principle, for it would raise no problem of ignoring individual characteristics in favor of a prevailing group characteristic or an average. Under this principle, supporters of the ERA repeatedly cited maternity legislation and laws governing childbearing and pregnancy as typical of legislative action which would *not* be affected by the ERA.

In sum, the Congressional legislative history underlying the ERA—which is in no way contradicted by the legislative history underlying the sex discrimination prohibition in Title VII of the Civil Rights Act of 1964—shows that where, as with the pregnancy exclusion in the California statute, there exists a basis for differentiation predicated on the unique characteristics of the female sex, a classification based on such differentiation is neither unreasonable nor unlawful.

IV

The current EEOC sex discrimination guideline relating to pregnancy and childbirth disabilities—which provides in part that "Disabilities caused or contributed to by pregnancy, miscarriage, abortion, child-

birth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment"—is not entitled to judicial deference. To implement Title VII of the Civil Rights Act of 1964, the EEOC has since November 1965 issued, and periodically amended, a series of guidelines on discrimination because of sex; but prior to 1972, when the current version was issued the guidelines were completely silent with respect to the treatment of disabilities resulting from pregnancy or childbirth. In 1965-1966, moreover, the EEOC's General Counsel issued a series of opinion letters which stated: (1) that the EEOC did not regard pregnancy to be comparable to illness or injury; (2) that an employer need not provide the same fringe benefits for pregnancy as he provides for illness; and (3) that a disability insurance benefit plan that excluded pregnancy coverage was not discriminatory.

The EEOC General Counsel who issued these opinion letters gave testimony in the *Gilbert* case, *supra*. He testified without contradiction: (1) that the letters reflected the official 1965-1966 EEOC policy and position arrived at after thorough discussion and consideration, including an inquiry into pertinent legislative history underlying Title VII; and (2) that, in the course of its 1965-1966 deliberations, the EEOC discussed and considered adopting a policy reflected in the current guideline on the treatment of pregnancy-caused disabilities under disability insurance plans, but deliberately rejected this alternative. The policy adopted by the EEOC in 1965-1966 is reflected,

moreover, in an EEOC Decision issued as late as December 1969.

Not only is the current EEOC guideline a departure from the EEOC's prior interpretation of Title VII, but it also contradicts positions taken by the Secretary of Labor implementing a Presidential order, Executive Order 11246, which prohibits sex discrimination by government contractors and subcontractors, and by the Wage and Hour Administrator under the Equal Pay Act. In addition, the current guideline conflicts with sick leave policies applied by other federal agencies to their female employees. The latter policies permit agencies to grant employees sick leave in advance of its actual accrual, but deny the advance of sick leave for pregnancy-related disabilities. This indeed was the policy of the EEOC until a policy change was effected in *May 1973*.

The EEOC, moreover, has not been consistent in applying its 1972 guideline on pregnancy and childbirth disabilities. Thus, in January 1973 the EEOC became a party to a settlement agreement resolving and discontinuing all pending litigation involving compliance by American Telephone and Telegraph Company and the Bell Companies with laws and regulations concerning equal employment opportunity. Even though the EEOC had knowledge that AT&T and the Bell Companies provide their employees with up to 52 weeks of benefits because of work absences due to sickness, but exclude from benefit eligibility female employees on maternity leave who experience normal pregnancies, the settlement agreement imposed no obligation on the companies to discontinue the latter pregnancy exclusion.

Congress has repeatedly passed statutes authorizing different treatment for men and women in similar or identical circumstances—a fact which casts doubt on the EEOC's guideline as a valid interpretation of Congressional intent. That intent is perhaps best indicated by the legislative history of the Equal Rights Amendment to the Constitution, which has been outlined above.

Administrative interpretations, like the EEOC's 1972 sex discrimination guideline relating to pregnancy and childbirth disabilities, which have not been consistently adhered to, and which are not contemporaneous with the enactment of a statute are not entitled to the judicial deference normally accorded agency interpretations. See *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944); *Udall* v. *Tallman*, 380 U.S. 1, 16-23 (1965); *National Labor Relations Board* v. *Boeing Co.*, 412 U.S. 67, 75 (1973). Cf. *Griggs, et al. v. Duke Power Company*, 401 U.S. 424, 436 (1971). *Espinoza* v. *Farah Manufacturing Co.*, —— U.S. ——, 38 L. Ed. 2d 287 (1973), where the Court refused to follow an EEOC guideline equating discrimination on the basis of citizenship with the Title VII proscription against discrimination on the basis of national origin, is controlling, because reasons there cited for rejecting the latter guideline also obtain with respect to the EEOC's 1972 guideline on pregnancy and childbirth disabilities.

ARGUMENT

I. Because Pregnancy Is Not A Disease, Sickness Or Illness, And Because It Is Voluntarily Induced, The Pregnancy Provision In The California Statute Is A Rational Provision.

In *Gilbert* v. *General Electric Company, supra*, extensive testimony by medical experts was adduced concerning the essential nature of pregnancy. Because the record in this case shows that no such testimony was taken in the court below, we think it might be helpful to the Court if we were to set out here a summary of the medical testimony in the *Gilbert* record concerning pregnancy, together with pertinent comments thereon. That testimony shows: (1) that pregnancy is not a sickness; and (2) that it is a voluntarily induced condition. As the purpose, moreover, of sickness and injury insurance is to soften the blow of an unexpected sickness or injury, the medical testimony in the *Gilbert* case—which we have no reason to believe does not reflect the common, or typical, medical view—thus establishes, we submit, a rational relationship between the pregnancy exclusion in the California statute and the statute's purpose.[5]

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[5] Section 2601 of the California Unemployment Insurance Code sets forth the purpose of California's disability insurance program. It states:

§ *2601. Purpose; construction*

The purpose of this part is to compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury and to reduce to a minimum the suffering caused by unemployment resulting therefrom. This part shall be construed liberally in aid of its

Three doctors gave medical testimony in the *Gilbert* case. Two were called as witnesses by the plaintiffs: Dr. David Forrest, a Richmond physician who specializes in obstetrics and gynecology; and Dr. Andre Hellegers, professor at Georgetown University, who practices in the field of obstetrics. The third, Dr. George D. Wilbanks, Chairman of the Department of Obstetrics and Gynecology, Rush Presbyterian-St. Lukes Medical Center, Chicago, and a practicing obstetrician and gynecologist, was called as a witness by the defendant, General Electric Company.

A. *Pregnancy Is Not A Sickness.*

Drs. Forrest, Hellegers, and Wilbanks all agreed that pregnancy is a "normal physiological function" or, as Dr. Wilbanks testified, "a normal variant formational alteration of physiology" (Tr. 59, 85-86, 289, 294, 578, 588).[6] All the doctors likewise agreed that pregnancy is not a sickness,[7] disease, or illness

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declared purpose to mitigate the evils and burdens which fall on the unemployed and disabled worker and his family.
(Stats. 1953, c. 308, p. 1529, § 2601.)

[6] "Tr." references are to pages in the official transcript of proceedings in *Gilbert* v. *General Electric Company*, July 24-26, 1973.

The early symptoms of the altered physiological state brought on by pregnancy—nausea, backache, abdominal swelling, and constipation—also appear in connection with the female menstrual period (Tr. 579-580).

[7] Dr. Wilbanks testified that the period after childbirth was not a period of illness; it was rather "a period of return of the altered state of physiology back to the more usual state... to the pre-pregnancy state" (Tr. 588-589).

(Tr. 59, 289, 578).[8] Dr. Wilbanks defined disease, medically speaking, as an "abnormal state which is deleterious to the patient" (Tr. 577). Dr. Forrest, defining disease, quoted from the definition in Dorland's Dictionary: "a definite morbid process having a characteristic train of symptoms" (Tr. 13, 55-56). Dr. Hellegers testified that the most common definition of disease is "that which, if not corrected, would continue leading to further debility and ultimately to death" (Tr. 243). Contrasting pregnancy and disease, Dr. Hellegers testified graphically (Tr. 288-289):

> I seem to recall saying that I thought it would be strange if the human race survived on the basis of a disease.

Dr. Hellegers further described disease as "something that is diagnosable by a physician as abnormal" (Tr. 289). Dr. Wilbanks testified that the term "'disease' would be the medical term and 'illness' and 'sickness' would be more lay terms for a similar condition," and that in general the terms are "synonomous" (Tr. 577).

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[8] Compare, "Pregnancy, labor and delivery are states unto themselves, but they are by no means illnesses." Hazell, Lester D., "Commonsense Childbirth," xxxiv (New York, Putnam's Sons, 1969). Also quoted in "Our Bodies Ourselves," p. 157, by The Boston Women's Health Book Collective (Simon and Shuster, 1971, 1973) which, at p. 227, states with respect to the book "Commonsense Childbirth": "Written by a woman. Best over-all book for many reasons: good to read, complete, and sensible approach to childbirth. The author has had children of her own, and conveys what it feels like to give birth. She has an understanding of the source of many women's problems during childbirth. . . ."

The physicians agreed that a pregnant woman can continue to be employed on her usual job until the onset of labor (Tr. 20-21, 65, 246, 583). Dr. Hellegers stated that this is "accepted medical practice in this country" (Tr. 246). The trend in the United States during the past 20 to 25 years has been toward hospital-type delivery and care (Tr. 29),* although in England (Tr. 64-65, 582) and in Europe (Tr. 64, 325) home deliveries by trained midwives are common. Moreover, according to Dr. Hellegers, delivery complication and mortality rates for Europe "have always been better than in this country" (Tr. 325). Dr. Hellegers also stated that "overwhelmingly" the physician is present during delivery as "a prevention of complications," rather than as a "primary requirement" (Tr. 329). Labor, he testified, "in itself does not require medical assistance . . . there is really nothing that the doctor does in labor except hold hands and rub backs and encourage, you know" (Tr. 328-329). Dr. Wilbanks testified that "most women probably do benefit from having a child" (Tr. 588).

As for the complications of pregnancy—which are now covered under the California statute—the medical testimony in the *Gilbert* case shows that not all

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* Dr. Wilbanks, explaining why, in the United States, babies are delivered in hospitals, testified (Tr. 582): "I think physicians, as well as the ancillary personnel, do give support to the mother, do assist in helping with nursing. Therefore, it is not simply delivery—it is care of the mother and the infant's psychological support. I think there is something to a group of women being together after they have delivered. They can talk over their problems about the baby, the nursing and this sort of thing."

pregnancies are normal, and that approximately 10% to 15% of women have complications associated with pregnancy (Tr. 56-57, 295).[10] But not all such complications require a woman to stop work (Tr. 24): only 1% to 2% of the women with complications have those that could be classified as "major" (Tr. 57), and of this very small percentage only some require hospitalization (Tr. 58).

It is submitted that the figures derived from the medical testimony in the *Gilbert* case concerning abnormality, and highlighting the relatively small number of the major complications of pregnancy, are unimpressive statistically, logically, and realistically; and that, accordingly, to liken pregnancy to disease and sickness on the basis of the complications would be highly incongruous.

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[10] Ten per cent of all pregnancies terminate in miscarriages, or "spontaneous abortions" (Tr. 247). They occur "overwhelmingly" before the tenth week of pregnancy, and 90% occur prior to the third week (Tr. 296). Miscarriages are usually not disabling, nor is hospitalization usually required: "by and large" most are an "in and out phenomenon within one day" (Tr. 296).

The second category of "complications" are those pre-existing conditions or underlying tendencies that are aggravated or brought out by the weight gain which routinely accompanies pregnancy (Tr. 241-242, 300-304). At least one-half do not require hospitalization (Tr. 306-307). Most are subject to diagnosis prior to the pregnancy (Tr. 84-85). Usually the treatment is like the treatment of the disease itself, unaffected by the pregnancy (Tr. 257-258).

The third category are those complications which result simply from the presence of the fetus or placenta (Tr. 68-72). At least a half of these do not require hospitalization (Tr. 72, 299, 306).

B. *Pregnancy Is A Voluntarily Induced Condition*

The testimony of the medical experts in the *Gilbert* case established that pregnancy can be avoided through the use of contraceptive devices. Dr. Wilbanks testified: "I would say that we really have a pretty much unlimited method of contraception or virtually foolproof methods of contraception if you use some type of contraceptive" (Tr. 596). The pill, Dr. Forrest said, "reduce[s] the chances of pregnancy to practically zero" (Tr. 54); Dr. Hellegers testified that considering the way the population uses the pill, there would be "one pregnancy in 100 years of exposure to intercourse" (Tr. 272); and Dr. Wilbanks stated that the pill, if taken properly, "is virtually a hundred per cent" effective (Tr. 596). Dr. Forrest, moreover, testified that the pill is commonly regarded in the obstetric community as being safer than childbirth (Tr. 54-55).

In addition to the pill, there are medically acceptable alternative methods of contraception. As to one, the IUD, Dr. Wilbanks testified that it "perhaps is a little less effective" than the pill, noting, moreover, that new models are even more effective (Tr. 596). Dr. Hellegers testified that the IUD failure rate can be reduced to about four per 100 years of exposure to intercourse (Tr. 273).[11]

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[11] The Planned Parenthood Association states that foam and condoms used together are effective 99 percent of the time. A diaphragm offers 85 to 90 per cent protection and, when used in conjunction with a condom, provides over 99 per cent protection. Thus, even for women who will not or cannot use the Pill or the IUD, there are several safe methods of contraception which provide almost complete protection from pregnancy. Planned Parenthood Association-Chicago Area, "The Inside Story," p. 9 (1973).

The voluntary nature of pregnancy is further manifested by the existence of two back-up methods for avoiding pregnancy: abortion and the "morning after" pill.[12] In *Gilbert*, Dr. Wilbanks testified that under proper conditions and safeguards abortions are safe and effective (Tr. 595). One method, menstrual extraction, requires just a few minutes, and is commonly called the "lunch hour treatment" (Tr. 597). The "morning after" pill has been accepted by the Food and Drug Administration, and it is quite effective if used properly (Tr. 595).

In sum, pregnancy is neither a sickness nor a condition caused by an injury or accident. Thus pregnancy, unlike any sickness or accident, results from the cumulative, four-fold exercise of free will necessary for a woman to bear a child: (1) there must be a voluntary decision to marry, as marriage still reflects by far the current standard of morality;

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[12] In *Roe* v. *Wade*, 410 U.S. 179 (1973), the Court held that within the first trimester elective abortions are a matter solely between the pregnant woman and her doctor, and that the states cannot prohibit or regulate the exercise of that right.

At least two courts have rejected the argument that an abortion alternative to pregnancy violated a woman's First Amendment right to free exercise of religion. In *Struck* v. *Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1972), vacated on other grounds, 409 U.S. 1071 (1973), an Air Force Officer faced discharge for pregnancy under an Air Force Regulation which also permitted cancellation of the discharge proceedings if the pregnancy was terminated. Captain Struck argued that as a Catholic she could not have an abortion and, therefore, she was unable to take advantage of the cancellation clause. The Ninth Circuit rejected her First Amendment argument. 460 F.2d at 1377. See, also, *Gutierrez* v. *Laird*, 346 F. Supp. 289, 293 (D.C. D.C. 1972).

(2) the couple must elect to have sexual intercourse —a two-person decision; (3) the couple must elect that conception will result—i.e., must elect to reject the various alternative methods available for avoiding pregnancy; and (4) if conception takes place, the couple must elect to accept the pregnancy and have the baby, and not to terminate the pregnancy by abortion. It should also be noted that even for the unmarried, the latter three choices are viable alternatives to the pregnant state. Finally, this Court itself has recognized that pregnancy is the result of deliberate choice. "By acting to penalize the pregnant teacher for *deciding to bear a child*, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of . . . protected freedoms." *Cleveland Board of Education* v. *La Fleur*, —— U.S. ——, 42 LW 4186, 4189 (1974) [emphasis supplied].[13]

II. Insurance Industry Practice, Which Has Consistently Excluded Pregnancy From The Concept Of Disability Because Of Cost And Other Considerations, Demonstrates The Rational Purpose Of The Pregnancy Exclusion In Section 2626 Of The California Insurance Code.

In his dissenting opinion in the court below, Judge Williams noted correctly that California's disability

[13] An article "The New Parents" in the New York Post, December 11, 1973, Magazine p. 1, describes the "mainstream" of today's thinking concerning couples having babies as follows: "Interviews with scores of expectant and reecnt parents, as well as statistical data, make it quite plain that virtually foolproof birth control, backed up by more social acceptance of couples who choose not to have children, have made the decision to have a child just that—a decision, a choice—more than has ever before been true."

benefits program was conceived by the State Legislature as an insurance program "to be operated under insurance concepts," and that the program's objective "was to protect against workers' loss of income by providing the broadest coverage and maximum benefits available within the limit of funds generated by a 1% contribution." *Aiello* v. *Hansen*, 359 F. Supp. 792, at 803-4. Accepting the "legitimacy" of the latter objective, Judge Williams concluded that the pregnancy exclusion which is the subject of this litigation was "rationally related" to such legislative objective. 359 F. Supp. at 805. See *Reed* v. *Reed*, 404 U.S. 71, 76 (1971).

In *Gilbert* v. *General Electric Company*, *supra*, evidence was adduced concerning the insurance industry practice in the United States with respect to employer-provided sickness and accident disability insurance coverage and the treatment of pregnancy thereunder. Because we believe that such evidence —which highlights the relatively high cost of covering pregnancy under such insurance, and which shows that the insurance underwriting industry has consistently excluded pregnancy from the concept of disability—buttresses Judge Williams' conclusion concerning the rational relationship between legislative objective and the pregnancy exclusion in Section 2626 of the California Insurance Code, we summarize that evidence below.[14]

Actuary Paul Jackson, a Fellow in the Society of Actuaries, who has worked in the area of disability

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[14] We also advert to uncontradicted evidence adduced in the *Gilbert* case showing General Electric Company statistics supportive of the insurance industry experience.

insurance coverage since 1956, testified in the *Gilbert* case without contradiction concerning the insurance industry practice. According to Mr. Jackson, approximately 40 per cent of the work force in the United States under age 65, or some 32,168,000 employees, is covered by sickness and accident disability insurance. The benefit periods of this insurance vary: about 45 per cent of the plans provide 13 weeks benefit coverage; 50 per cent provide coverage for 26 weeks; and only 5 per cent provide coverage for 52 weeks (Tr. 348; GE Exh. 42).[15] Only about 42.6 per cent of these plans, covering about 13,500,000 employees, provide a pregnancy benefit, and such coverage, Mr. Jackson testified, is "almost always . . . limited to six weeks . . ." (Tr. 349). Presently, moreover, the cost per unit of benefit under the existing insurance for a female employee is approximately 170 per cent of that for a male employee even where no maternity benefit is provided;[16] where a six-weeks maternity benefit is provided, the female cost per unit of benefit runs to 210 per cent of the male employee cost; and the latter percentage goes up to 300-330 per cent of the male employee cost per unit

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[15] "Tr." and "GE Exh." references are to the transcript of proceedings and the record in the *Gilbert* case. "Pre-trial Stip." references appearing below are to the parties' factual stipulations which are also included in the *Gilbert* record. See note 6 above.

[16] GE's experience supports Mr. Jackson's testimony as to the greater cost of providing female benefits. In 1970, GE's average cost per insured employee of total benefits paid under its sickness and accident insurance was $82.57 for females and $45.76 for males; in 1971, the average cost for females was $112.91 and $62.08 for males (Pre-trial Stips. 143 and 144).

of benefit where full maternity coverage is provided (Tr. 360). According to Mr. Jackson, the annual cost of adding maternity benefits to the sickness and accident disability income plans currently in effect in the United States would be $1,353,000,000 [17] (Tr. 361, GE Exh. 42).[18]

Actuary Jackson explained, moreover, that there are features unique to pregnancy claims which, from an actuarial standpoint, increase the relative cost of pregnancy insurance coverage: First, the fact that income loss will occur at a predictable time "well off in the future" allows for disability "planning" and opens the possibility of claim abuse (Tr. 354-5). Second, pregnancy, unlike most sicknesses and accidents, is not wholly beyond the control of the insured (Tr. 355). Third, the duration of ordinary disability and maternity claims is different, the median duration of the former being two weeks and the latter 15 weeks (Tr. 355).[19] Fourth, concern for

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[17] This figure was predicated upon plans currently existent in the United States. It did not allow for the possibility that the existence of the benefit might result in an increase in the birthrate (Tr. 362, 400).

[18] Another actuarial study in evidence in the *Gilbert* case, that by Alexander J. Bailie, put the additional cost per year for a 20 weeks maternity benefit at $1,005 million; for a 25 weeks benefit at $1,313 million; and for a 30 weeks benefit at $1,620 million (GE Exh. 13). Mr. Bailie, a Fellow in the Society of Actuaries since 1960, is the actuary in charge of actuarial functions pertaining to group insurance for Metropolitan Life Insurance Company.

[19] Here, too, GE's experience regarding the duration of pregnancy absences *prior to delivery* suports Mr. Jackson's testimony: In 1971, when there were 2,476 pregnancy ab-

the child and initial child care requirements act as incentives for the mother to put off resumption of work (Tr. 355-56).

There is another factor which increases the relative cost of pregnancy coverage. Actuary Jackson testified that in order to counteract the problems of claim abuse and malingering to which disability insurance is notoriously subject, various control mechanisms are employed (Tr. 346, 350). Great difficulties are connected, however, with the design of control mechanisms for maternity benefits. A so-called supervisory control, whereby individuals who abuse sickness and accident coverage are passed up for promotion or receive less merit pay increases, is frequently ineffective, as is the traditonal benefit limitation of 60% or 65% of pay (Tr. 353, 356, 390). The reason for this, Mr. Jackson testified, is that in maternity cases "approximately half of the female employees who have children do not return to work" (Tr. 353, 356). By comparison, Mr. Jackson further testified, generally 100 per cent of those employees who recover from short term disabilities actually come back to work (Tr. 354).[20] Payment of

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sences, only 15 per cent were less than 5 weeks duration, 29 per cent were between 8 and 11 weeks duration, and 22 per cent were between 12 and 15 weeks duration. In 1970, when there were 3,261 pregnancy absences, only 12 per cent were less than 5 weeks duration, 30 per cent were between 8 and 11 weeks duration, and 21 per cent were between 12 and 15 weeks duration.

[20] GE's experience shows that approximately 40 per cent of GE's female employees who have babies do not return to work. Thus in 1970, of 3,548 total pregnancies among GE female employees, 1,956 women returned to work and 1,592

"temporary sickness" benefits in instances of pregnancy would therefore be completely inconsistent with the purpose of disability insurance protection—to protect employee earnings—in that half of the recipients would actually have left the work force permanently at the time of payment.

In sum, the insurance industry experience shows that the addition of a pregnancy benefit to sickness and accident insurance coverage not only causes a significantly large increase in overall insurance costs, but it further accentuates the normal cost and benefit imbalance under such insurance which markedly favors females over males.[21]

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did not return; and in 1971, there were 2,781 total pregnancies, from which 1,634 women returned to work, and 1,147 did not return (Pre-trial Stip. 101).

In contrast to the 40% non-return rate among GE female employees who have babies are statistics reflecting general employee turnover in GE plants. A study of the 1972 employee turnover in seven GE plants selected for their large female population (Tr. 413, 417; GE Exh. 41A) revealed that the female "quits as percentage of total employment" was only 18 percent, as compared with 11 per cent for the male employees. A second study of four plants (GE Exh. 41B) showed a 10 per cent quit rate for females as compared with a 6 per cent quit rate for males.

[21] As shown, the practice of the insurance underwriting industry is to exclude pregnancy from coverage under sickness and accident disability policies. For equal protection purposes, it is noteworthy therefore that three major industrial states, including California, have by statute or regulation, recognized the significance and relevance of insurance industry practices in the context of anti-sex discrimination provisions. Thus Section 1432 of the California Fair Employment Practices Act states that: "Nothing contained in this part relating to

A. *The Cost Of Providing Pregnancy Coverage Is A Relevant And Material Consideration*

Fiscal considerations, this Court has stated, are legitimate concerns "in the area of economics and social welfare." *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970); *Jefferson* v. *Hackney*, 406 U.S. 535, 546 (1972). *Dandridge* involved an equal protection challenge to a public welfare assistance program, the Court holding that Maryland's maximum grant regulation under its aid to families with dependent children program, which called for a per capita diminution of welfare benefits for each additional child that lived in the household, did not violate the equal protection clause of the Fourteenth Amendment. The Court declared specifically that as

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discrimination on account of sex shall be deemed to affect the operation of the terms or conditions of any bona fide retirement, pension, employee benefit, or insurance plan, provided such terms or conditions are in accordance with customary and reasonable or actuarially sound underwriting practices." BNA FEP Manual, 451:132. Section XI(A) of the Illinois Sex Discrimination Guidelines states: "The Commission considers that it is a violation of the Act for an employer or labor organization to offer, contract for or participate in a group life or health insurance or other 'fringe benefit' plan which discriminates among employees or members on the basis of sex. However, differences in contributions, benefits or other provisions in such plans which are adopted in good faith based on sound actuarial data may not be deemed to violate the Act." BNA FEP Manual, 451:355. And the guidelines for applying the 1965 sex amendment of the New York Law Against Discrimination state: "In administering group life insurance, health insurance or other 'fringe benefits,' the employer may make distinctions between men and women workers to the extent that they are required by the underwriting policies of insurance carriers." BNA FEP Manual, 451:907.

Maryland was dealing with "finite resources," policy decisions had to be based on cost determinations for effectuating the program. 397 U.S. at 479. In *Jefferson*, the Court upheld procedures used by the State of Texas in its federally assisted welfare program. The Texas State Constitution provides a ceiling on the amount the State can spend on welfare assistance grants. In order to allocate this fixed pool of welfare money among the numerous individuals with acknowledged need, the State adopted a system of percentage grants. Under the system, the State first computed the monetary needs of individuals eligible for relief under each of the federally aided categorical assistance programs. Then, since the constitutional ceiling on welfare was insufficient to bring each recipient up to this full standard of need, the State applied a percentage reduction factor in order to arrive at a reduced standard of need in each category that the State can guarantee. The Court upheld the use of the percentage reduction factor in the face of an equal protection claim that it resulted in discrimination against Blacks and Mexican-Americans.[22]

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[22] Cf. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), which held invalid a statutory waiting period required of new residents for welfare assistance eligibility, the Court said (394 U.S. at 633):

> We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its

See also *Vlandis* v. *Kline*, 412 U.S. 441 (1973), and *O'Gorman & Young* v. *Hartford Fire Ins. Co.*, 282 U.S. 251, 256 (1930). In *Vlandis*, where the Court sustained a due process attack against a Connecticut statute that created a permanent and irrebuttable presumption of non-residence for the purpose of determining tuition and other fees under the State's university system, the Court nevertheless characterized as "legitimate" the State's objective of cost equalization between bona fide residents and non residents. 412 U.S. at 448. In *O'Gorman & Young*, the Court upheld a New Jersey statute placing a ceiling on insurance agent's commissions, considering the cost to the public and to policy holders of such commissions as highly relevant.

We respectfully submit that the rationale of the California Court of Appeals in upholding Section 2626, which Judge Williams' dissent in the court below echoes, merits favorable consideration by this Court. In *Clark* v. *California Employment Stabilization Comm*, 166 Cal. App. 2d 326, 332 P.2d 716 (1958), hearing denied by Calif. Supreme Court, Feb. 11, 1959, the California Court of Appeals said (166 Cal. App. 2d at 331-332):

> Without doubt, the rate of employee contributions is related directly to the demand upon the

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citizens. . . . The saving of welfare costs cannot justify an otherwise invidious classification.

A classification based on sex is not, however, an invidious classification. *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). Moreover, in *Shapiro* the Court specifically noted (394 U.S. at 633, n.10): "We are not dealing here with state insurance programs which may legitimately tie the amount of benefits to the individual's contributions."

> Fund, which, in turn, is affected by the extent of the coverage provided. . . . It is reasonable to assume that the inclusion of illness or injury caused by pregnancy within the coverage provided by the statute would increase substantially the demands upon the Fund and requier a like increase in the contribution rate. . . . It was properly within the sphere of legislative action to determine whether the objects of the statute in question would be served best by including a disability benefit which reasonably might impose upon the majority of employees a burden disproportionate to contemplated benefits in order to favor the minority who were included within the classified group. These reasons indicate that the class excluded was not arbitrarily selected, and that the purpose of the exclusion was germane to the legislative object.

Accord: *Rentzer* v. *California Unemployment Insurance Appeals Board*, 32 Cal. App. 3d 604 (1973): "We agree with the court's conclusion [in *Clark*] that the legislative purpose in enacting the pregnancy exclusion of section 2626 was to spare the unemployment disability program the costs of a maternity benefit plan."

III. The Congressional Legislative History Of The Equal Rights Amendment To The Constitution Shows That The Pregnancy Exclusion In The California Statute Reflects A Reasonable Classification Based On Characteristics Unique To The Female Sex.

In *Reed* v. *Reed*, *supra*, 404 U.S. at 76, the Court noted that the Equal Protection Clause requires that a classification be "reasonable" and "not arbi-

trary." [23] The pregnancy exclusion in the California statute here before the Court reflects a reasonable, non-arbitrary, classification based on characteristics unique to the female sex—a statement that is borne out, we submit by the Congressional legislative history of the proposed Equal Rights Amendment to the Constitution ("ERA").[24] Fourteen of the members of the House Committee on the Judiciary who supported the original version of H. J. Res. 208, the

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[23] It is to be noted that although classifications based on race, alienage, and national origin have been determined by the Supreme Court to be "suspect," sex has not been so categorized. In *Reed* v. *Reed*, the Court was specifically requested to declare sex a "suspect" classification, see 30 L. Ed. 2d at 864, but declined to do so by finding the state preference for males as estate administrators to be without any "reasonable" relationship to the state interests in question. In *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), moreover, six members of the Court did not join in Mr. Justice Brennan's opinion that all classifications based upon sex are "inherently suspect." Because sex is not an "inherently suspect" classification, the analysis utilized in the race discrimination Title VII cases, like *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), which subject inherently suspect classifications by race to strict judicial scrutiny to determine if an overriding or compelling contrary interest justifies their use, is totally inapplicable.

[24] As approved by the Congress, the ERA provides:

> Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.
>
> Section 3. This Amendment shall take effect two years after the date of ratification.

version of the ERA ultimately approved by both houses of Congress, stated as their Separate Views on H. J. Res. 208: [25]

> The legal principle underlying the Equal Rights amendment as proposed by Mrs. Griffiths [Rep. Martha Griffiths of Michigan] is that the law must deal with the individual attributes of the particular person and not with stereotypes or over-classification based on sex. However, the original resolution does not require that women must be treated in all respects the same as men. "Equality" does not mean "sameness". *As a result, the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex. For example, a law providing for payment of the medical costs of child bearing could only apply to women.* In contrast, if a particular characteristic is found among members of both sexes, then under the proposed amendment it is not the sex factor but the individual factor which should be determinative. [Emphasis added.]

The majority Report of the Senate Committee on the Judiciary on the ERA specifically approved this quoted excerpt from H.R. Rep. No. 92-359. The Senate Committee stated that: [26]

> The Separate Views of Congressman Edwards and 13 other members of the House Judiciary Committee in the House Report on the equal rights amendment, H.R. Rep. 92-359, state con-

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[25] H. R. Rep. No. 92-359, 92nd Cong., 1st Sess. 7 (1971).

[26] As introduced into the Congressional Record by Sen. Bayh of Indiana, 118 Cong. Rec. S 4584-5 (daily ed. March 22, 1972).

> cisely and accurately the understanding of the proponents of the Amendment. [The majority Report then quotes several paragraphs from the Separate Views, including the one quoted above.]

These Reports were based in part on testimony given at the subcommittee hearings by a number of strong advocates of the ERA. Among these was Representative Martha Griffiths of Michigan, who was one of the leaders of the effort to obtain Congressional approval for the ERA. In her testimony before the House Sub-committee considering the proposed amendment, Rep. Griffiths indicated the limits on "sex discrimination" as that concept would be treated under the ERA. In explaining what the amendment would *not* do, she testified: [27]

> Like private action, governmental action dealing with a physical characteristic unique to one sex would not be affected by the equal rights amendment. Where a law deals with a physical characteristic unique to one sex, equality between the sexes could not be achieved, for such a law could not apply in practice to both sexes. Therefore, the equal rights amendment would not affect laws dealing with a physical characteristic

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[27] Hearings before Subcommittee No. 4 of the Committee on the Judiciary, House of Representatives, 92nd Cong., 1st Sess., on H. J. Res. 35, 208, and Related Bills and H.R. 916 and Related Bills 40 (1971). (Hereinafter cited as "ERA House Hearings".) To the same effect see testimony of Rep. Bella Abzug of New York, *Id.* at 116; and testimony of Betty Friedan, founder of the National Organization for Women, Hearings on S.J. Res. 61 before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary, U.S. Senate, 91st Cong., 2d Sess. 493 (1970). (Hereinafter cited as "ERA Senate Subcommittee Hearings.")

> unique to one sex, such as laws governing childbearing, sperm donation, or criminal acts capable of being committed by members of only one sex.

And in response to questioning on whether the ERA would prohibit all classifications taking account of sex, Representative Griffiths again acknowledged the natural limitation on the scope of the Amendment: [28]

> But you would have to have some distinction in laws that apply to mothers, to pregnant women, because men aren't pregnant. You don't have to have the same law applying because of different functions of the body. The bodies are not exactly the same, so there could be a difference.

The position taken by Representative Griffiths is clearly the most sensible approach to the general question of what constitutes a reasonable classification based on sex, and the same position was repeatedly adopted by supporters of the ERA. Even witnesses who claimed to endorse a more "absolutist" interpretation of the ERA endorsed the position. Thus Lucille H. Shriver, Federation Director, The National Federation of Business and Professional Women's Clubs, Inc. in her statement before the House Subcommittee stated: [29]

> The significant point always is: Is the distinction one of sex alone or, is there something added or some special function served. On this basis, for example, maternity legislation would not be

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[28] ERA House Hearings 51.

[29] ERA House Hearings 156. To the same effect, testimony of Jean Faust, Assistant on Women's Rights to Rep. William F. Ryan of New York, ERA House Hearings 103.

> affected by the equal rights amendment. Maternity legislation affects only females . . . . The fact is, that maternity legislation can be available only to women because they alone, physiologically, house the prenatal child and childcarrying is the criterion for maternity legislation.

Quite obviously such an interpretation is, in substance, identical with that of Rep. Griffiths.

The most comprehensive analysis of the limits on the scope of the proposed ERA was presented to both the Senate and House committees by Thomas I. Emerson, Lines Professor of Law, Yale Law School.[30] Professor Emerson testified before the Senate Judiciary Committee that:[31]

> The fundamental legal principle underlying the equal rights amendment, then, is that the law must deal with the individual attributes of the particular person, not with a vast over-classification based upon the irrelevant factor of sex. It should be noted at this point that there is one type of situation where the law may focus on a sexual characteristic but the basic principle just stated has no application.
>
> This occurs where the legal system deals directly with a physical characteristic that is unique to one sex. In this situation it could be said that,

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[30] Hearings on S.J. Res. 61 and S.J. Res. 231 before the Committee on Judiciary, U.S. Senate, 91st Cong., 2d Sess. 430, n.7 (1970). (Hereinafter cited as "ERA Senate Judiciary Committee Hearings.") Professor Emerson was the successful counsel who prepared the brief and argued the precedent-making case, *Griswold* v. *Connecticut*, 381 U.S. 479, involving the important issue of the right to privacy.

[31] ERA Senate Judiciary Committee Hearings 298-9.

> in a certain sense, the individual obtains a benefit *or is subject to a restriction*, because he or she belongs to one or the other sex.
>
> Thus a law providing for payment of the medical costs of childbearing would cover only women, and a law relating to sperm banks would restrict only men. Such legislation cannot be said to deny equal rights to the other sex. There is no basis here for seeking or achieving equality. [Emphasis added.]

And in his testimony before the House Subcommittee, Professor Emerson said:[32]

> . . . the equal rights amendment does not preclude legislation, or other official action, which relates to a physical characteristic unique to one sex. . . . So long as the characteristics is [sic] found in all women and no men, or all men and no women, the law does not violate the basic principle of the equal rights amendment; for it raises no problem of ignoring individual characteristics in favor of a prevailing group characteristic or an average.[33]

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[32] ERA House Hearings 402.

[33] Professor Emerson's statements were recently echoed in the Ohio State Law Journal: "There are many statutes and regulations to prevent hemophiliacs and colorblind persons from driving or holding certain jobs, and yet the judiciary does not customarily view such burdens as offending males generally. The fact that these sex linked traits exhibit their symptoms exclusively in males would be viewed as fortuitous and incidental to regulations which speak narrowly to the underlying conditions. A similar cultural habit of mind tends to prevent judges from viewing criminal rape statutes as offending males generally nor prosecutions of prostitution to females generally." Note, Equal Protection and The Pregnancy Leave Case, 34 Ohio State L.J. 628, 631 (1973).

In sum, the legislative history underlying the ERA teaches that not every differentiation based on sex-related physical characteristics is unlawful; and that where, as with the pregnancy exclusion in the California statute, there exists a basis for differentiation predicated on the unique characteristics of the female sex, a classification based on such differentiation is neither unreasonable nor unlawful.[34]

IV. The Current EEOC Sex Discrimination Guideline Relating To Pregnancy And Childbirth Disabilities Is Not Entitled To Judicial Deference Because It Is In Direct Conflict With The EEOC's Prior Interpretation, As Well As With Positions Expressed By Other Federal Agencies And The Congress.

We anticipate that the Equal Employment Opportunity Commission's current guideline relating to the treatment for job-related purposes of disabilities due to pregnancy or childbirth, *supra* note 2, may be

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[34] Nothing in the legislative history underlying the sex discrimination prohibition in Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2(a)) is in any way contradictory of the ERA history. Indeed, a statement by Senator Humphrey, the effective manager of the pending Senate bill, shows that the Senate, at least, did not take the simplistic view that the sex discrimination prohibition must be applied automatically against any employer action which affects male and female employees differently. Thus Senator Humphrey explained that the Bennett Amendment (110 Cong. Rec. 13647) to the bill, the purpose of which was to avoid conflicts between the sex discrimination prohibition and the Equal Pay Act, made it "unmistakenly clear" that despite the latter prohibition *"difference of treatment in industrial plans, including earlier retirement options for women, may continue in operation under this bill if it becomes law"* [Emphasis supplied]. 110 Cong. Rec. 13663-4 (1964).

cited to the Court in support of the decision below. For this reason, and even though the court below did not expressly advert to the guideline, we comment on it here in order to show that it is not entitled to the deference normally accorded administrative interpretations.[35]

Historically, Guidelines on Discrimination Because of Sex were originally issued by the EEOC on November 24, 1965 (30 Fed. Reg. 14926); they were amended by the EEOC on February 21, 1968 (33 Fed. Reg. 3344); were again amended on August 19, 1969 (34 Fed. Reg. 13367); and were last amended and revised effective April 5, 1972 (37 Fed. Reg. 6835). The earlier guidelines expressed no view with respect to the way disabilities resulting from pregnancy or childbirth were to be treated. Indeed, the topic was adverted to in the guidelines for the first time in 1972 when with the issuance of the amendments of April of that year, the guidelines in their present form were published.

The first public expression by the EEOC on the treatment of pregnancy under Title VII appeared in

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[35] As set forth above, the EEOC guidelines on sex discrimination were promulgated to implement the statutory prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964. Both the pertinent statutory provisions and the relevant current guidelines are quoted, *supra*, at pp. 3-4. In pertinent part the current, 1972, guideline relating to pregnancy disabilities provides: "Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment." 29 C.F.R. 1604.10.

a series of opinion letters issued by the EEOC's General Counsel in 1966. Therein the EEOC's then position as to whether pregnancy had to be treated as an illness was thus set forth:

> The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees. . . . we do not believe that an employer must provide the same fringe benefits for pregnancy as he provides for illness. . . .

Further, the EEOC's then position on the specific question of whether pregnancy need be covered under a disability insurance benefit plan was also set forth:

> . . . an insurance or other benefit plan may simply exclude maternity as a covered risk, and such an exclusion would not in our view be discriminatory.[36]

In testimony given in *Gilbert* v. *General Electric Company, supra*, a former EEOC General Counsel,[37] who occupied that office for some 15 months in 1965

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[36] The excerpted passages set forth in the text were identified as representative of statements in EEOC opinion letters prepared and sent out by the EEOC General Counsel during 1965-1966. The letters were sent out and made public in response to inquiries made of the Commission. Testimony of Charles Duncan, Esq., former EEOC General Counsel, in *Gilbert* v. *General Electric Company*, No. 142-72-R, E.D. Va. See the Appendix hereto.

[37] Charles Duncan, Esq., currently President of the District of Columbia Bar. Pertinent excerpts from Mr. Duncan's testimony in the *Gilbert* case are set forth in the Appendix hereto.

and 1966, stated without contradiction that the quoted statements from the 1966 letters reflected official EEOC policy during his incumbency as General Counsel. He further testified: (1) during the first year of the EEOC's existence—i.e., the year beginning July 2, 1965—questions and problems respecting sex discrimination "occupied a good deal of the Commission's attention" and "were thoroughly discussed by the Commission," and, during the same period, the treatment of pregnancy disabilities under an employer's disability insurance plan was specifically considered by the full Commission; (2) in formulating its 1965-1966 policy, the Commission considered and inquired into the legislative history underlying Title VII with respect to sex discrimination; (3) the Commission's 1965-1966 policy and position was that pregnancy could be treated differently from "medical illness," and that under an employer-sponsored employee disability insurance plan it was not necessary "to provide the same benefits for maternity absence [as] for illness-caused absence;" and (4) in the course of its 1965-1966 deliberations on sex discrimination, the Commission "extensively considered" and discussed as a possible alternative the policy reflected in the current EEOC guidelines with respect to the treatment of pregnancy-caused disabilities under employee disability insurance plans, considering such a policy in the light of the legislative history underlying Title VII, but consciously and deliberately rejecting it (Tr. 559, 561-564, 566-567). The EEOC policy and position thus described is reflected in a Commission Decision (No. 70-360) issued on December 16, 1969, which states in part: "The Commission policy with respect to pregnancy does not seek to compare

an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex. . . ." The 1969 Decision is reproduced in CCH EEOC Decisions ¶ 6084.[38]

Not only is the current EEOC guideline a departure from the prior interpretation of the statute by the EEOC, but it also contradicts the position of other federal agencies. Thus, the Sex Discrimination Guidelines promulgated by the Secretary of Labor pursuant to Executive Order 11246 (3 C.F.R. 173)[39] do not require that employee medical benefit plans cover pregnancy-related disabilities as long as an employer makes equal contributions to such plans for employees of both sexes (41 C.F.R. § 60-20.3(c)).[40] Moreover,

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[38] See also the following excerpt from a speech delivered to the Industrial Relations Research Association, Washington, D. C., Chapter by Sonia Pressman, then Senior Attorney, Office of the General Counsel, EEOC, on April 16, 1969, stating the EEOC's then position to be as follows: "The Commission . . . has not to date equated [pregnancy] with sickness. Thus, the Commission has ruled . . . that an employer may have a medical and hospital insurance plan which covers the expenses of delivery, but excludes disabilities related to pregnancy, childbirth, miscarriage, and abortion." CCH Employment Practices ¶ 8004 at p. 6005 (June 19, 1969).

[39] Executive Order 11246 is a Presidential order which prohibits government contractors and subcontractors from discriminating in employment on the basis of race, color, religion, sex, or national origin. "Sex" as a prohibited type of discrimination was added to the order by a 1968 amendment (32 Fed. Reg. 14303).

[40] On December 27, 1973, the Secretary of Labor published in the Federal Register (38 Fed. Reg. 35336) proposed revisions in the Guidelines which, *inter alia*, proposed that

regulations promulgated by the Wage and Hour Administrator under the Equal Pay Act, 29 U.S.C. 206(d), provide that payments relating to maternity are not wages for purposes of that statute (20 C.F.R. § 800.110), and further state (20 C.F.R. § 800.116 (d)):

> If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other.

In addition, the EEOC's current guideline on employment policies relating to pregnancy and childbirth is in direct conflict with the maternity sick leave benefits and leave policies established by other federal agencies for their own female employees. These policies deny advance sick leave benefits for pregnancy-related disabilities,[41] establish fixed peri-

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"medically verifiable disabilities which are related to pregnancy be treated as temporary disabilities." The Secretary went on to state: "The OFCC, however, recognizes the need to continue to be guided by pertinent judicial decisions, including those expected to be rendered by the United States Supreme Court during this present term." The views of interested parties were solicited.

[41] The Civil Service Commission policy provides that an employee may be granted up to a total of 30 days sick leave in advance of its accrual, but provides further that requests for advance sick leave for reasons of pregnancy "should" and "will" usually be denied; the policies of the NLRB, the Department of Justice, the Library of Congress, and the Department of Health, Education and Welfare are not to advance sick leave for pregnancy or confinement; the policies of the

ods for the commence ment of maternity leave,[42] and deny unmarried females "self-only" coverage for pregnancy and maternity hospitalization and doctors benefits under health benefits plans established pursuant to the Federal Employees Health Benefits Law and approved by the Civil Service Commission.[43]

THE EEOC itself, on December 20, 1972, and January 26, 1973, denied requests for advance of sick leave for reasons of pregnancy and confinement "except in cases of serious disability regarding the maternity aspect." On May 25, 1973, this policy was changed so that requests for advanced sick leave for reasons of pregnancy and confinement are treated the same as "other cases of serious disability regardless of the maternity aspect."[44] Not changed, however, was the EEOC's continuing requirement that its

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Department of Agriculture, the Forest Service, and the Office of the Secretary of Defense, Joint Chiefs of Staff, Court of Military Appeals, Defense Security Assistance Agency provide that advanced sick leave for reasons of pregnancy or confinement "should" not be allowed (Exhibits and Stipulations in *Gilbert* v. *General Electric Company, supra*).

[42] The Department of Justice, the Department of Agriculture, the Forest Service, and the Department of Health, Education and Welfare require their female employees to commence maternity leaves six weeks before the expected date of delivery (*Id.*).

[43] The American Postal Workers Union Plan; the Group Health Association Plan; National Association of Letter Carriers Plan; American Federation of Government Employees Plan (benefits payable for severe complications of pregnancy, but amount reduced by $250) (*Id.*).

[44] Presumably, the May 25, 1973, change was triggered by an exhibit list served by defendant GE in the *Gilbert* case, *supra*.

female employees begin maternity leave "not later than four weeks prior to the expected delivery" (EEOC Manual, 7-25-69). Exhibits and Stipulation in *Gilbert* v. *General Electric Company, supra*).

The EEOC, moreover, has *not* been consistent in its application of the 1972 guideline on employment policies relating to pregnancy and childbirth. As revealed in Federal Communications Commission rate increase proceedings involving American Telephone & Telegraph Company and 24 of its associated operating companies ("Bell Companies"), FCC Case No. 19143, in which the EEOC participated as a petitioner in opposition to AT&T and the Bell Companies, the Bell Companies provide their employees with up to 52 weeks of benefits because of absences from work due to physical disabilities caused by sickness, but exclude from benefit eligibility female employees on maternity leave who experience normal pregnancies. Yet, on January 18, 1973, after extensive negotiations, the EEOC, the Department of Labor, and AT&T on behalf of itself and the Bell Companies, signed an Agreement providing, *inter alia*, for the entry of a consent decree in a district court,[*] the resolution and discontinuance of all pending litigation concerning compliance by AT&T and the Bell Companies with all laws and regulations concerning equal employment opportunity, and the dismissal of the EEOC opposition to the proposed rate increases in the FCC proceedings. Although this Agreement

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[*] The provisions of the Agreement were in fact embodied in a Consent Decree entered in the United States District Court, Eastern District of Pennsylvania, on January 18, 1973. See § 1860, CCH Employment Practices Guide.

provides that adherence to its terms constitutes full compliance with all laws and regulations governing equal employment opportunity, it imposes no obligation on AT&T or the Bell Companies to discontinue their current policy and practice of not paying sickness benefits to their female employees who are absent from work as the result of normal pregnancies (Exhibits and Stipulations in *Gilbert* v. *General Electric Company, supra*).[46]

Casting even more doubt on the EEOC's guideline as a valid interpretation of Congressional intent, is the fact that Congress itself has repeatedly passed statutes authorizing different treatment for men and women in similar or identical circumstances.[47] Per-

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[46] On April 13, 1973, a class action against one of the Bell Companies, Illinois Bell Telephone Company, alleging sex discrimination against female employees by the failure to provide disability insurance benefits for pregnancy-related disabilities was subsequently filed in the District Court for the Northern District of Illinois, after the issuance of a right to sue letter and a determination of probable cause to believe Title VII had been violated in this respect by an EEOC District Director (Exhibit and Stipulation in *Gilbert* case, *supra*). See also *Wisconsin Telephone Company* v. *Dept. of Industry, Labor and Human Relations, Etc.*, 6 EPD ¶ 8937 (Wis. Cir. Ct. Nov. 19, 1973), holding that Wisconsin Telephone Company, a Bell Company, can continue its practice of not paying sickness disability benefits for pregnancy.

[47] See, e.g., Coast Guard, 14 U.S.C.A. § 762 (husband of member of Women's Reserve not a dependent unless in fact dependent on her for support); Coast Guard, 14 U.S.C.A. § 490 (death gratuity to widows); Pay and Allowances to Military Personnel, 37 U.S.C.A. § 401 (a person is not a dependent of a female member unless in fact so dependent on her for over one-half of his support); Pay and Allowances to Military Personnel, 37 U.S.C.A. § 551 (dependent defined as "his

wife"); Veterans' Benefits, 38 U.S.C.A. § 315 (additional compensation for "wife" of disabled veteran); Veterans' Benefits, 38 U.S.C.A. § 321 (basic entitlement for "surviving widow" of veteran); Veterans' Benefits, 38 U.S.C.A. § 322 (rates of death compensation for "widow" of veteran); Veterans' Benefits, 38 U.S.C.A. § 341 (basic entitlement for "surviving widow" for peacetime death); Veterans' Benefits, 38 U.S.C.A. § 411 (dependency and indemnity compensation to a "widow"); Veterans' Benefits, 37 U.S.C.A. § 412 (benefits to a "widow" in certain cases of in-service or service-connected deaths); Veterans' Benefits, 38 U.S.C.A. § 531, § 532, § 534, § 536, § 541 (benefits to "the widows" of veterans of various wars); Veterans' Benefits, 38 U.S.C.A. § 544 (aid and allowance to "any widow" entitled to a pension); Veterans' Benefits, 38 U.S.C.A. § 1700 and 1701 (educational assistance program for the "widows" of veterans); Public Lands, 43 U.S.C.A. § 171 (rights of "wife" of homesteader who "has been abandoned and deserted by her husband"); Public Lands, 43 U.S.C.A. § 278 (right of "widow" of veteran to make entry); Shipping, 46 U.S.C.A. § 601 (attachment of seaman's wages may not interfere with wages "for the support and maintenance of his wife"); Labor, 29 U.S.C.A. § 11-§ 14 (establishment, appointments, powers and duties of Women's Bureau in Department of Labor); Armed Forces, 10 U.S.C.A. § 3297, § 3311, § 3296 (the Women's Army Corps); Armed Forces, 10 U.S.C.A. § 505 (distinctions made between men and women on minimum enlistment age and length of original enlistment); Patriotic Societies and Observance, 36 U.S.C.A. § 177 (different required observances for men and women during hoisting and lowering of flag); Public Contracts, 41 U.S.C.A. § 35(d) (different minimum employment ages for males and females); Lighthouses, 33 U.S.C.A. § 771 (benefits for widows of lighthouse personnel); Internal Revenue Code, 26 U.S.C.A. § 7448 (annuities to "widows" of tax court judges); Judiciary and Judicial Procedure, 28 U.S.C.A. § 604 (regulation and payments of "annuities to widows . . . of judges"); Judiciary and Judicial Procedure, 28 U.S.C.A. § 375 and § 376 (annuities to "widows" of justices and judges); Internal Reevnue Code, 26 U.S.C.A. § 214 (determination of certain deductions de-

haps the most significant indication of Congressional intent in this respect is the legislative history of the recent ERA amendment. As set forth above, pp. 30-37, that history discloses that Congress expressly intended to permit pregnancy to be differentiated from matters covered by the amendment.

It is settled law that administrative interpretations which have not been consistently adhered to, and which are not contemporaneous with the enactment of a law, are not entitled to the judicial deference normally accorded agency interpretations. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Thus in *F.T.C.* v. *Jantzen, Inc.*, 356 F.2d 253 (9th Cir. 1966), *rev'd on other grounds*, 386 U.S. 228 (1967), the court stated the principle as follows (356 F.2d at 254, n.4):

> . . . we owe little, if any, deference to the Commission's views as to what the statute does. A consistent interpretation of a statute by the body created to administer it is indeed entitled to judicial respect. But it goes beyond all reason to apply the same rule to diametrically inconsistent positions taken by such a body. If we owe any

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pendent on male or female, husband or widow status); Internal Revenue Code, 28 U.S.C.A. § 3121 (differentiation between men and women regarding age after which remuneration will not be considered "wages"); Foreign Service, 22 U.S.C.A. § 1079(d) (grants to needy ineligible "widows"); Minerals Lands and Mining, 30 U.S.C.A. § 922 and § 902 (benefits to "widow" of deceased miner).

Whether or not these statutes would survive an attack under the Fourteenth Amendment is not material here. What is important is the intent of Congress is passing Title VII. Cf. *Frontiero* v. *Richardson*, 411 U.S. 677 (1973).

> deference to the Commision's views, it is to those that were contemporaneous with the enactment of the statute. . . .

In *Udall* v. *Tallman*, 380 U.S. 1, 16-23 (1965), the Court gave deference to an interpretation of the Secretary of the Interior only after a detailed analysis showed that his interpretation had been contemporaneous, consistent, heavily relied upon, and was not unreasonable. In *Griggs, et al.* v. *Duke Power Company*, 401 U.S. 424, 436 (1971), the Court did not accept the EEOC guidelines on employment testing as the proper interpretation of Title VII until it was convinced by a thorough review of the legislative history that the construction "comports with Congressional intent." The elements of agency consistency and contemporaneous construction were emphasized by the Court in *National Labor Relations Board* v. *Boeing Co.*, 412 U.S. 67, 75 (1973), in upholding the Board's position that it was not required to inquire into the reasonableness of union-imposed fines.[*] These cases demonstrate, we submit, that judicial acceptance of administrative interpretations depends upon careful scrutiny; or, as the Court said in *Skidmore* v. *Swift & Co.*, *supra*, 323 U.S. at 140:

> The weight of such a judgment [i.e., the administrative interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its con-

[*] In *Iselin* v. *United States*, 270 U.S. 245, 251 (1926) the Court, in an opinion written by Mr. Justice Brandeis, stated that the regulation "cannot be given the force and effect of law" because "the construction [of the statute by the regulatory agency] was neither uniform, general, nor long continued."

sistency with earlier and later pronouncements and all those factors which give it power to persuade, if lacking power to control.

See also *Espinoza* v. *Farah Manufacturing Co.*, —— U.S. ——, 38 L. Ed. 2d 287 (Nov. 19, 1973), where the Court refused to follow an EEOC guideline equating discrimination on the basis of citizenship with the Title VII proscription against discrimination on the basis of national origin. The Court cited these reasons for rejecting the EEOC's guideline interpretation: (1) the guideline position was contrary to the Congressional understanding of the term "national origin," as shown by, among other things, Congressional enactments in related areas (". . . deference [to the EEOC guideline] must have limits where, as here, application of the guideline would be inconsistent with an obvious Congressional intent not to reach the employment practice in question," 38 L. Ed. at 295); (2) the guideline position was inconsistent with a "general understanding" [••] of the

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[••] In *Brennan* v. *General Telephone Co.*, —— F.2d ——, 21 WH Cases (BNA) 415, 417 (5th Cir., Nov. 16, 1973), the Fifth Circuit listed the various reasons for according weight to administrative interpretations, referring to a "reenactment of the statute in circumstances which indicate legislative approval." Here, of course, the enactment of Title VII's sex discrimination prohibition occurred in the context of prior interpretations by state legislators and administrators which show that the contemporaneous "general understanding" was that the pregnancy exclusion here in issue was not unlawful. Thus GE's Labor Relations Counsel testified in *Gilbert* v. *General Electric Company, supra*: "When the Act was passed it was passed in the context of the existence of a number of statutes in states in which GE operated, as I have indicated, which for years had prohibited sex discrimination. Many of

term's meaning, as shown by federal regulations and the statutes of various states (38 L. Ed. at 291, n.2); and (3) the guideline position was contrary to an earlier Commission position expressed "through its General Counsel" (38 L. Ed. at 294).[*] The *Espinoza* case therefore is of controlling significance with respect to the EEOC's 1972 guideline on pregnancy and childbirth disabilities: the guideline is contrary to Congress's understanding of what is meant by sex discrimination (see *supra*, pp. 30-37); (2) the 1972 guideline sets forth a position inconsistent with state statutes and administrative interpretations by state and federal agencies (see *supra*, pp. 41-45, and note 49); and (3) the 1972 guideline completely reverses the EEOC's earlier position, as first expressed by its General Counsel (see *supra*, pp. 37-41).

In sum, in view of the principles outlined above, the EEOC's 1972 sex discrimination guideline relating to pregnancy and childbirth disabilities is not entitled to judicial deference: First, having been issued some seven years after Title VII went into effect, the guideline does not represent a "contemporaneous construction;" and it certainly is inconsistent

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those Fair Employment Commissions in those states charged with the enforcement of those Acts were aggressive and we had many complaints and investigations over the period of time prior to 1964. At no point in time did any state agency ever question the exclusion of pregnancy from the S and A benefits in the period beginning 1950 through 1964" (Tr. 446).

[*] When the *Espinoza* case was before the Court of Appeals, the Seventh Circuit likewise refused to follow the EEOC's guideline, saying with respect to it: "While acknowledging deference is due, blind adherence is not." 462 F. 2d 1331, 1334 (7th Cir. 1972).

with the previous contemporaneous, and thoroughly considered, 1966-1971 EEOC position and policy. Indeed, only the 1966-1971 EEOC policy and published construction, reflecting the judgment of those entrusted with setting Title VII's machinery in motion, meet the criteria for deference as enunciated by the Supreme Court.[51] Second, the guideline is also directly contrary to the positions of other federal agencies which have dealt with the identical subject; is in conflict with employment policies established for pregnant female employees of many government agencies, including, until May 25, 1973, the EEOC itself; and is, in addition, inconsistent with other expressions of Congressional intent.

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[51] No weight attaches to the 1972 guideline by reason of the fact that it was issued shortly after the effective date of the 1972 Amendments to Title VII, because there was no change in the sex discrimination provisions of the statute which would justify changing the EEOC's prior position on employment policies relating to pregnancy and childbirth. Indeed, it can be strongly argued that the Congress in passing the 1972 amendments without changing the "sex" provision must have known, and approved by implication, the published opinions of the 1966-1971 period.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

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Dated: February 1974.

APPENDIX

Excerpts from the Official Transcript of Proceedings in *Gilbert* v. *General Electric Company*, No. 142-72-R, United States District Court for the Eastern District of Virginia:

* * * *

[542] *CHARLES DUNCAN* was called as a witness by and on behalf of the defendant and, having been first duly sworn, was examined and testified on his oath as follows:

* * * *

[549] DIRECT EXAMINATION

BY MR. STRAUSS:

Q Would you state your name and residence address, sir?

A Charles T. Duncan, D-u-n-c-a-n, 1812 Upshur, U-p-s-h-u-r Street, NW, Washington, D. C.

Q Mr. Duncan, what is your occupation or profession?

A I am an attorney at law admitted to practice in the District of Columbia.

* * * *

[550] Q Are you an officer of the District of Columbia Bar?

A Yes. We have a unified D. C. Bar and I am this year President of that organization.

Q Now, prior to your becoming engaged in the private practice of law in the District of Columbia were you employed in an official capacity by the District of Columbia Government?

A Yes. I was Corporation Counsel for the District of Columbia.

* * * *

[551] Q You were, were you not, at one time, employed by the EEOC?

A Yes, I was.

Q And in what capacity were you so employed?

A I was General Counsel of the Equal Employment Opportunity Commission.

Q And would you pinpoint the dates?

A I believe I became General Counsel on August 8, 1965, and I took the oath of office as Corporation Counsel on October 31, 1966.

I assume I went off the EEOC payroll on that date, but I am not sure.

Q You just don't remember, but in view—

A It was sometime very late in October.

Q In October, 1966?

A That is correct.

* * * *

[553] Q Mr. Duncan, the letter[s] which represent the Defendant's Exhibit Number 12, are you the author of the letter[s]?

A Well, let me respond this way. These letters were prepared in my office. As to whether I drafted particular language, I don't remember that, but I do recognize the two letters as being letters which were prepared in my office or certainly similar to letters which were prepared in my office.

* * * *

[555] Q Is it a fair statement to say, sir, that letters containing . . . similar opinions to those expressed therein were sent out by you before you left the Commission in response to inquiries made of the Commission?

A Yes.

* * * *

[559] Q Do you recall whether letters setting forth opinions such as those [set] forth in Defendant's Exhibit 12 were discussed at any time with the Commission?

A You mean on the specific point of pregnancy? Maternity leave?

Q The matters discussed and set forth in those letters?

A Yes.

This was one of the issues that I would not have decided on my own initiative, and indeed did not.

This particular question, how to treat [560] pregnancy and maternity leave, was particularly discussed at the Commission level and with senior staff in order to formulate the Commission's policy.

Q What about the matter of the treatment of pregnancy disabilities under an employment—under an employer's disability plan?

A That subject was discussed at the Commission level.

Q Do you recall who was present at these discussions?

A I cannot pinpoint a discussion or a date. I do know that this question was considered by the full Commission, and I know who the Commissioners were.

Q Now, do the letters, that is, do the letters which are in evidence as Defendant's Exhibit 12 reflect the policy of the EEOC during your incumbency as General Counsel with respect to the treatment of pregnancy disabilities under an employer disability benefit plan?

A Yes.

* * * *

[561] Q Now, how thoroughly was this matter discussed within the Commission?

A I would have to answer you this way. The whole question of sex discrimination occupied a good deal of the Commission's attention during the first year.

Pregnancy, maternity leave was one aspect of the sex discrimination.

It was also one of the problems that I think baffled the Commission the most. So I would say that this aspect of sex discrimination certainly as well as the broader problem of other aspects of sex discrimination were thoroughly discussed by the Commission.

Q When the Commission was consider[ing] the formulation of these policies which are set forth in the exhibit, was there any consideration given to the legislative history of Title 7 with respect to sex discrimination?

A Unfortunately, Mr. Strauss, as I am sure you know, there is little or no legislative history of Title 7 insofar as sex discrimination was concerned.

We wished that there had been some, but as you know, the word was added to race, color, religion, et cetera, not fortuitously but without any legislative history.

[562] Q But whatever legislative—but you did make an inquiry into the question of whether there was explicit legislative histroy?

A Oh, indeed, because in interpreting Title 7 we relied heavily on the legislative history whenever it was available. I am saying in the instance of sex discrimination there wasn't any.

* * * *

[563] Would you look at the last sentence, please, in the November 15 letter?

A Yes.

Q Would you explain, if you can, what the term "fringe benefits" means as used in that sentence?

A Yes. Fringe benefits would include wage continuation, pay, pay in the nature of sick pay, hospitalization, any other benefit like that applied in the case of absence due to other illnesses. But I think the chief thing was pay.

Q Pay continuation, are you saying?

A Yes.

Q During pregnancy?

A Yes. During the absence.

Q Whether or not the pregnancy was covered by a disability policy, is that what this refers to?

A No. I am trying to say that it was the Commission's position that pregnancy could be treated differently from a medical illness and that it was not necessary to make the same provision in the case of pregnancy as was made in the case of medical illness, be [564] it under company policy or under various sickness and health plans.

Q Now, would you look, please, at the November 10 letter, Mr. Duncan, and in particular to the last two paragraphs thereof?

A Yes.

Q I note that there is a reference in there to an employee disability plan, benefit plan financed by both the employer and the employees.

Would the response set forth in the letter have been any different had the letter been concerned with a disability benefit plan sponsored by the employer alone?

A No, clearly not. It was put that way because that is the way the question was put to us. It was our style to answer the question as asked. However

the plan is financed, on a contributory basis or solely by the employer, the Commission's policy was that you did not have to provide the same benefits for maternity absence that you did for illness-caused absence.

* * * *

[566] Q Mr. Duncan, to get on with it, have you had occasion to read the guidelines on discrimination because of sex which were issued by the EEOC in 1972?

A Yes, I have.

Q How recently was that?

A As recently as today.

Q You [are] then familiar with the policies expressed in such guidelines, that is the 1972 guidelines, concerning the matter of disability insurance coverage and so-called pregnancy and childbirth disabilities?

A Yes.

Q Now, in 1966 when the policy formulated in the letter[s] we have here was taking place, was there any discussion within the Commision of a policy such as appears in the 1972 guidelines?

A I would say yes, Mr. Strauss, to the best of my recollection.

As I indicated earlier, the Commission policy [567] on this point was extensively considered, various alternatives for treating this problem, how do you handle maternity leave, various alternatives were discussed.

One of the alternatives that was discussed was, necessarily, would have been to treat it as an illness-induced absence. So that was discussed, yes.

Q And rejected?

A Well, the Commission's policy was as these letters state.

Q So that this may be clear, [it] may have been evident, but I presume then that when the so-called 1972 policy was discussed in connection with the 1966 formulation the presence or absence of legislative history was also discussed at the same time?

A I am sure it was. I don't specifically remember that.

* * * *

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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-640

DWIGHT GEDULDIG,

Appellant,

vs.

CAROLYN AIELLO, individually and on behalf of all others similarly situated,

Appellees.

DWIGHT GEDULDIG,

Appellant,

vs.

AUGUSTINA D. ARMENDARIZ, ELIZABETH B. JOHNSON, JACQUELINE JARAMILLO, individually and on behalf of all other women similarly situated,

Appellees.

Consolidated Cases on Appeal From the United States District Court for the Northern District of California.

Brief of Merchants and Manufacturers Association, et al., as Amici Curiae.

This Brief Amici Curiae in support of the position of the Appellant is filed with the consent of all parties,[1] as provided in Rule 42 of the Rules of this Court.

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[1]Letters consenting to the filing of this brief have been filed with the Clerk of the Court.

Interest of the Amici Curiae.

The Merchants and Manufacturers Association and the Federated Employers of the Bay Area (hereinafter the "Associations") are organizations representing the interests of employers and groups of employers in the State of California. The Associations each represent the interests of hundreds of employers of varying sizes and in diverse industries. Some member employers have as few as one employee; others employ many thousands.

Southern California Edison Company, Union Oil Company of California, and Pacific Mutual Life Insurance Company (hereinafter the "Employers") are employers within the State of California, and as such, are subject to the disability insurance provisions of the California Unemployment Insurance Code (hereinafter sometimes referred to as the "Code").

Section 3251 of the California Unemployment Insurance Code provides that where an employer or the majority of its employees desire to avail themselves of a disability insurance plan other than that mandated by law, they may apply to the Director of Human Resources Development for approval of such "voluntary plan". Section 3254[2] of the Code requires the Director

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[2] "*§ 3254. Approval of voluntary plan: Conditions prerequisite: Termination of plan*

"The director shall approve any voluntary plan, except one filed pursuant to Section 3255, as to which he finds that there is at least one employee in employment and all of the following exist:

"(a) The rights afforded to the covered employees are greater than those provided for in Chapters 2 and 3 of this part.

"(b) The plan has been made available to all of the employees of the employer employed in this State or to all employees at any one distinct, separate establishment maintained by the employer in this State. 'Employee'

to approve such a plan if he finds that certain conditions have been met. Among other things, the Director

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as used in this subdivision includes such individuals in partial or other forms of short-time employment and employees not in employment as the director shall prescribe by authorized regulations.

"(c) A majority of the employees of the employer employed in this State or a majority of the employees employed at any one distinct, separate establishment maintained by the employer in this State have consented to the plan.

"(d) If the plan provides for insurance the form of the insurance policies to be issued have been approved by the Insurance Commissioner and are to be issued by an admitted disability insurer.

"(e) The employer has consented to the plan and has agreed to make the payroll deductions required, if any, and transmit the proceeds to the plan insurer, if any.

"(f) The plan provides for the inclusion of future employees.

"(g) The plan will be in effect for a period of not less than one year and thereafter continuously unless the director finds that the employer or a majority of his employees employed in this State covered by the plan have given notice of the termination of the plan. The notice shall be filed in writing with the director and shall be effective only on the anniversary of the effective date of the plan next following the filing of the notice, but in any event not less than 30 days from the time of the filing of the notice; except that the plan may be terminated on the operative date of any law increasing the benefit amounts provided by Sections 2653, 2655, and 2801, if notice of the termination of the plan is transmitted to the director not less than 30 days prior to the operative date of such law. If the plan is not terminated on such 30 days notice because of the enactment of a law increasing benefits, the plan shall be amended to conform to such increase on the operative date of the increase.

"(h) The amount of deductions from the wages of an employee in effect for any plan shall not be increased on other than an anniversary of the effective date of the plan except to the extent that any increase in the deductions from the wages of an employee allowed by Section 3260 permits such amount to exceed the amount of deductions in effect.

"(i) The approval of the plan or plans will not result in a substantial selection of risks adverse to the Disability Fund."

California Unemp. Ins. Code § 3254 (West, 1972).

must find that the voluntary plan will provide greater benefits to covered employees than they would receive through the State Disability Fund and that a majority of the persons employed by the employer in California or a majority of the persons employed at one of the employer's business establishments in the State has consented to the plan. The Director must also find that the employer has agreed to make any payroll deductions required by the plan.

Section 3260 of the California Unemployment Insurance Code permits an employer to assume all or part of the expense of providing the disability insurance coverage afforded by the voluntary plan. While the employer is permitted to make deductions from employees' wages to finance the plan, the amount of such deductions may not be higher than the deductions the employees would pay if they were paying contributions to the Unemployment Compensation Disability Fund administered by the State.

Each of the Employers, and many of the companies represented by the Associations, maintains an approved voluntary plan of disability insurance. Many California employers pay all or most of the costs of such voluntary plans. Many voluntary plans are part of comprehensive health and welfare programs maintained for the benefit of the employees, and such health and welfare programs are often established by collective bargaining contracts between the employer and one or more labor unions. The employer's maintenance of benefits under such a voluntary plan may be compelled by the collective bargaining contract. Further, the collective bargaining contract may require the employer to pay all or part of the cost of disability insurance under the voluntary plan, or it may forbid

the employer from increasing its employees' contributions even where such contributions could otherwise be increased pursuant to the provisions of the California Unemployment Insurance Code. Therefore, the employer may be unable to discontinue its voluntary plan or to increase its employees' contributions to the plan even though the costs of maintaining benefits under the plan increase far beyond the levels foreseen at the time of negotiating the collective bargaining contract.

Since, pursuant to Section 3254 of the Code, the benefits provided by each voluntary plan must be greater than those provided by the State Disability Fund, voluntary plans of disability insurance will be required to provide maternity benefits if the state program is required to provide such benefits. The Employers and the Associations have a substantial interest in seeing that benefits under their disability insurance programs are held to a fiscally responsible level because, as benefits rise, the expenses of employers who pay all or part of the costs of their voluntary plans may also rise.

Southern California Edison Company (hereinafter "Edison") employs more than 13,000 persons in California, and it maintains a voluntary plan which is part of a comprehensive, integrated health and welfare program. The program includes retirement benefits, group insurance, medical insurance, medical insurance for dependents, and a stock purchase plan as well as the voluntary plan of disability insurance. Edison's disability insurance plan provides benefits far in excess of those mandated by the California Unemployment Insurance Code.[2] In 1972 the total cost of Edison's dis-

[2]Employees with less than 6 months of seniority with Edison receive a weekly benefit while disabled of 110 percent of the

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ability insurance plan was $5,431,653, and employee contributions to the plan amounted to $1,036,283 or about 19.07 percent of the total cost of the program. By 1973 the cost of Edison's voluntary plan had risen to approximately $6,150,000, and employee contributions to the plan amounted to approximately $1,150,000 or 18.7 percent of the total cost.

In 1972, 13 Edison employees terminated their employment due to pregnancy, and another 31 employees took leaves of absence due to pregnancy.[4] Of the 31 employees who took pregnancy leave, 22 terminated their employment at the conclusion of the leave of absence,[5] and only 9 returned to work. The average length of the leaves of absence was 4.8 months. If Edison's disability insurance program had afforded maternity benefits to the 44 pregnant employees, the cost

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amount payable from the State Disability Insurance Plan for a maximum period of 26 weeks after a one week waiting period. There is no waiting period if the employee is hospitalized. Employees with 6 months or more of service receive full pay for each day of accrued and unused sick leave. Sick leave accrues at the rate of 1¼ days per month of active and continuous service. After full paid benefits are exhausted, an additional weekly benefit of 110 percent of the maximum benefit provided by the State Plan is payable for up to 52 weeks. There is no waiting period for receipt of such benefits.

In addition, for each day a disabled employee is hospitalized, not to exceed 20 days in a disability period, the plan pays an additional $12. Supplementary benefits are payable if a disability requires an employee to return to work in a job with a lower pay rate than his regular and customary job. If a disability period continues after termination of employment, benefits are payable to the extent they would be payable under the State Plan.

[4]Figures are not available for the number of pregnancy leaves of absence or the number of Edison employees who terminated their employment due to pregnancy in 1973.

[5]It is reasonable to assume that if maternity benefits were paid under disability insurance programs, virtually all pregnant employees would exhaust their maternity benefits under the plan prior to terminating their employment.

of the program would have been increased by approximately $127,000. If the average length of leaves of absence due to pregnancy increased to 6 months,[6] the additional cost to the program for the 44 pregnancies would have been approximately $150,000.

Union Oil Company of California (hereinafter "Union") employs approximately 5,700 persons in the State. Union's voluntary plan of disability insurance is part of an integrated plan of health and welfare benefits which includes retirement benefits, company-paid life insurance, employee-paid life insurance, medical benefits, medical benefits for dependents, supplemental accident insurance, survivor income protection and profit sharing in addition to the disability insurance provided by the voluntary plan. Union's voluntary plan of disability insurance is entirely financed through employee contributions. However, such contributions would be inadequate to support the plan if maternity benefits were also provided. For the two-year period from 1972 through 1973, Union's disability program cost approximately $958,265. During the same two-year period, 133 employees took leaves of absence due to pregnancy, and the leaves averaged slightly more than four months in duration. Seventy-three of these employees returned to their jobs following their leaves of absence, while 60 terminated their employment at the end of their maternity leave.[7] If the 133 women who took pregnancy

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[6]If maternity benefits are provided under disability insurance programs, the average length of pregnancy leaves of absence will undoubtedly increase because, at least for some employees, the financial incentive to return to work will be lessened.

[7]Union does not know the number of employees who terminated their employment due to pregnancy without first taking maternity leave because it does not keep records reflecting the

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leave during 1972 and 1973 had been eligible for maternity benefits under Union's disability program, the cost of the program would have been increased by approximately $234,361 or about 24.5 percent.

Pacific Mutual Life Insurance Company (hereinafter "Pacific Mutual") employs approximately 1,500 persons in California. Pacific Mutual's voluntary plan of disability insurance is part of an integrated, comprehensive health and welfare program which includes retirement benefits, survivor income protection, short term disability benefits,[8] life insurance, medical benefits, and medical benefits for dependents. Pacific Mutual's voluntary plan of disability insurance cost $124,571 during the two-year period from 1972 through 1973; employee contributions to the plan accounted for $99,234 or about 79.7 percent of this cost. Pacific Mutual's employees contribute only one-half the maximum amount permitted by the California Unemployment Insurance Code.

During 1972 and 1973, Pacific Mutual's employees experienced approximately 13,400 days of disability which were covered by its voluntary plan. During the same period, 26 employees terminated their employment

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reasons for voluntary terminations. Further, employees do not always fully or accurately state their reasons for terminating employment. Many who terminated for "personal reasons" or to "stay at home" may have actually terminated due to pregnancy. If maternity benefits are provided under policies of disability insurance, these employees can be expected to exhaust such benefits prior to termination. Therefore, the Employers' estimates of the increased costs which would arise from providing maternity benefits under voluntary plans are the minimum amounts by which such costs would rise.

[8]Pacific Mutual's short term disability benefits plan provides benefits in addition to those of its voluntary plan. The short term disability plan pays two-thirds of the salary of a disabled employee up to $2,500 of such salary per month.

due to pregnancy and 16 other employees took leaves of absence due to pregnancy. The average pregnancy leave of absence was 3.2 months. If the 42 women who took leaves of absence or terminated their employment due to pregnancy during 1972 and 1973 had been entitled to maternity benefits under Pacific Mutual's voluntary plan of disability insurance, $42,806, or about 34.4 percent, would have been added to the cost of the program.[9]

The Employers and the Associations are interested in this case due to the substantial financial effect which a decision upholding the District Court's opinion would have upon many California employers who maintain voluntary plans of disability insurance. The Employers and the Associations wish to assure that their unique financial interest is adequately protected and that their voluntary plans of disability insurance are not judicially modified to provide maternity benefits. This brief is filed to present those considerations and to urge this Court to reverse the District Court and to hold that a disability insurance program designed to protect workers against sickness and injury may constitutionally exclude provision of maternity benefits for normal, uncomplicated pregnancies.

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[9]The Employers' estimates of the amount by which maternity benefits would increase the costs of their disability insurance plans do not take into consideration the increased cost which could result from abuse of the plans. Normal, uncomplicated pregnancy is, unlike illness and injury, almost entirely voluntary. Therefore, affording maternity benefits under disability insurance plans would allow women not interested in a career to abuse the program by working a short period, becoming pregnant, and collecting maternity benefits after contributing little, if any, funds to their employers' voluntary plans.

ARGUMENT.

I.

This Case Should Be Dismissed as Moot Insofar as It Concerns Appellees Aiello, Armendariz and Johnson.

Former Section 2626 of the California Unemployment Insurance Code provided that disability benefits were not available for injury or illness caused by or arising in connection with pregnancy prior to 28 days after the termination of such pregnancy.[10] The District Court held that the third sentence of this provision deprived appellees of the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States. *Aiello v. Hansen*, 359 F.Supp. 792 (N.D.Cal. 1973). Appellant was enjoined from refusing to grant disability insurance benefits on account of the third sentence of Section 2626 and instructed to reconsider the applications of each of the appellees and grant them such benefits as they would have been entitled to receive without regard for that sentence.

Appellees Aiello, Armendariz and Johnson suffered complications in their pregnancies; Appellees Aiello and Johnson had ectopic pregnancies and Appellee Armendariz suffered a miscarriage. While this case was

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[10] "*§ 2626. What 'disability' or 'disabled' includes*

" 'Disability' or 'disabled' includes both mental or physical illness and mental or physical injury. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work. In no case shall the term 'disability' or 'disabled' include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter."

California Unemp. Ins. Code § 2626 (West, 1972).

pending before the District Court, the California Court of Appeal for the Second Appellate District had before it *Rentzer v. California Unemployment Insurance Appeals Board*, 32 Cal.App.3d 604, 108 Cal.Rptr. 336 (1973), an action involving former Section 2626 of the California Unemployment Insurance Code.

Petitioner Rentzer had suffered an ectopic pregnancy and, as a result, had been unable to work for six weeks. When, pursuant to the third sentence of former Section 2626, she was denied benefits for the first 28 days of her disability, she petitioned for a writ of mandate directing the California Unemployment Insurance Appeals Board to provide her with full disability benefits. Her petition was denied and she appealed. On May 24, 1973, seven days prior to the District Court's decision in the instant case, the Court of Appeal reversed and narrowly construed the third sentence of former Section 2626 as excluding only *maternity* benefits.[11] So construed, the statute denied only benefits for normal gestation and delivery and did not deny benefits for women such as Ms. Rentzer and Appellees Aiello, Armendariz and Johnson, who suffered involuntary, unforeseen complications in their pregnancies.

Following the *Rentzer* decision the Department of Human Resources Development administratively determined that the exclusion of benefits contained in former Section 2626 of the Code should apply only to maternity benefits, that is, benefits for normal, uncomplicated gestation, delivery and recuperation. The Department issued revised guidelines reflecting these changes. As a result, women otherwise eligible for dis-

[11]The Court relied heavily on *Clark v. California Emp. Stab. Com.*, 166 Cal.App.2d 326, 332 P.2d 716 (1958). See pages 26 and 44-45, *infra*.

ability benefits were paid such benefits for abnormal pregnancies involving involuntary complications. The guidelines specifically provided that such complications included miscarriage, such as that suffered by Appellee Armendariz, and ectopic pregnancies such as those of Appellees Aiello and Johnson. Jurisdictional Statement of Appellant, Appendix I at 49-50. Appellees Aiello, Armendariz and Johnson each received full disability benefits identical to those they would have received had their injuries resulted from a cause other than pregnancy.

On October 1, 1973, Assembly Bill 809 was signed into law; it became effective on January 1, 1974.[12] That bill amended former Section 2626 and added Section 2626.2 to the California Unemployment Insurance Code. Section 2626.2 specifically provides full disability benefits for claimants disabled due to abnormal and involuntary complications of pregnancy.

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[12] "§ 2626. (a) 'Disability' or 'disabled' includes both mental or physical illness, mental or physical injury, and, to the extent specified in Section 2626.2, pregnancy. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work.

* * * *

"§ 2626.2. Benefits relating to pregnancy shall be paid under this part only in accordance with the following:

"(a) Disability benefits shall be paid upon a doctor's certification that the claimant is disabled because of an abnormal and involuntary complication of pregnancy, including but not limited to: puerperal infection, eclampsia, caesarean section delivery, ectopic pregnancy, and toxemia.

"(b) Disability benefits shall be paid upon a doctor's certification that a condition possibly arising out of pregnancy would disable the claimant without regard to the pregnancy, including but not limited to: anemia, diabetes, embolism, heart disease, hypertension, phlebitis, phlebothrombosis, pyelonephritis, thrombophlebitis, vaginitis, varicose veins, and venous thrombosis."

California Unemp. Ins. Code §§ 2626, 2626.2, ch. 1026, §§ 2-3 [1973], 6 Deering's Calif. Codes Annotated, Advance Legislative Service, pp. 1936-1937, 1973.

Appellees Aiello, Armendariz and Johnson and all others similarly situated were, due to the decision of the California Court of Appeal in *Rentzer*, made eligible for full disability benefits prior to the rendering of the District Court decision in the instant case. Subsequent to the *Rentzer* decision the Department of Human Resources Development provided administratively for the payment of such benefits to persons such as Appellees Aiello, Armendariz and Johnson, and each of said Appellees was fully compensated for her injury. Finally, such benefits are now expressly provided to such persons by statute. Therefore, Appellees Aiello, Armendariz and Johnson and other women similarly situated have no interest in the continuation of this case in this Court. Having obtained eligibility for full disability benefits and having received such benefits, their cases have become moot and should be remanded to the District Court for dismissal. *Diffenderfer v. Central Baptist Church*, 404 U.S. 412 (1972). If not dismissed, these cases should be vacated and remanded for consideration of the mootness issue. *Struck v. Secretary of Defense*, 409 U.S. 1071 (1973), *vacating and remanding*, 460 F.2d 1372 (9th Cir. 1971).[12]

The remaining Appellee, Ms. Jaramillo, had a normal pregnancy and delivery, and, therefore, her action is one to compel the payment of maternity benefits under the disability provisions of the California Un-

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[12]Following the decision in *Rentzer*, Appellant herein moved for reconsideration of the District Court's decision. The motion was based upon the significant change in Section 2626 of the Code which was brought about by the *Rentzer* decision and by the liberal interpretation given that decision by the Department of Human Resources Development. Appellant's motion was denied, apparently without consideration of the mootness issue. Jurisdictional Statement of Appellant, Appendices C, D and E, at 31-38.

employment Insurance Code, an insurance program designed only to assist ill and injured workers. The District Court failed to realize the crucial distinction between Appellee Jaramillo's claim for maternity benefits and the other Appellees' claims for disability arising from the abnormal and involuntary complications of their pregnancies. Since the claims of Appellees Aiello, Armendariz and Johnson have become moot, this case now involves only the constitutionality of California's decision not to pay maternity benefits under its disability insurance program. The remainder of this brief concerns the appropriateness and constitutionality of that decision of the California State Legislature.

II.

The Statute Challenged Here Is Valid if It Meets the Standards Enunciated in Reed v. Reed[14] and Cleveland Board of Education v. LaFleur.[15]

A. The Statute Challenged Here Does Not Deny the Equal Protection of the Laws if the Classification It Creates Is Reasonable, Not Arbitrary and Has a Fair and Substantial Relation to the Object of the Legislation.

Legislation based upon suspect classifications or concerning fundamental interests is subject to strict judicial scrutiny and will be found to deny the equal protection of the laws unless it can be shown that such legislation is necessitated by a compelling governmental interest. *Graham v. Richardson*, 403 U.S. 365, 371-372 (1971); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). Legislation involving neither suspect classifications nor

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[14]404 U.S. 71 (1971). See pages 16-18, *infra*.

[15]42 U.S.L.W. 4186 (U.S. Jan. 21, 1974). See pages 22-24, *infra*.

fundamental interests is presumed valid and will be upheld unless it is shown that the legislation bears no rational relationship to a legitimate governmental purpose. *Rodriguez v. San Antonio Independent School District*, 411 U.S. 1 (1973).

Recent decisions both of this Court and of the lower federal courts hold that classifications involving sex are valid if they are reasonable, nonarbitrary, and rest upon some ground of difference having a fair and substantial relation to the object of the legislation. See *Schattman v. Texas Employment Commission*, 459 F. 2d 32, 40-41 (5th Cir. 1972); *Green v. Waterford Board of Education*, 473 F.2d 629 (2d Cir. 1973); *Struck v. Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1971), *vacated and remanded*, 409 U.S. 1071 (1973); *Bravo v. Board of Education of City of Chicago*, 345 F.Supp. 155 (N.D.Ill. 1972).

In *Gruenwald v. Gardner*, 390 F.2d 591 (2d Cir. 1968), *cert. den.* 393 U.S. 982 (1968), the plaintiff, a male, challenged as unconstitutional a portion of the Social Security Act, 42 U.S.C. § 415(b)(3). He complained that, due to the statutory scheme of computing benefits, he received only $80.50 per month while a woman with a history of equal earnings would receive $115.60 per month. The court upheld the challenged provision, stating:

> "It is only the 'invidious discrimination' or the classification which is 'patently arbitrary [and] utterly lacking in rational justification' which is barred by either the 'due process' or 'equal protection' clauses. * * *
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> "There is here a reasonable relationship between the objective sought by the classification,

which is to reduce the disparity between the economic and physical capabilities of a man and a woman—and the means used to achieve that objective in affording to women more favorable benefit computations. There is, moreover, nothing arbitrary or unreasonable about the application of the principle underlying the statutory differences in the computations for men and women. Notwithstanding the favorable treatment granted to women in computing their benefits, the average monthly payments to men retiring at age 62 still exceeds those awarded women retiring at that age. * * * "[T]he trend of authority makes it clear that the variation in amounts of retirement benefits based upon differences in the attributes of men and women is constitutionally valid. * * *"

Gruenwald v. Gardner, 390 F.2d 591, 592-593.

This Court has recently held that legislation attacked as sexually discriminatory is violative of the Equal Protection Clause of the Fourteenth Amendment only if such legislation creates arbitrary, unreasonable classifications which do not have a fair and substantial relation to the object of the legislation. *Reed v. Reed,* 404 U.S. 71 (1971). In *Reed,* this Court invalidated an Idaho statute which gave mandatory preference for appointment as administrator of a decedent's estate to a male applicant over an equally qualified female applicant. Referring to the standard of review required by the Equal Protection Clause, the Court said:

"In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat differ-

ent classes of persons in different ways. Barbier v Connolly, 113 US 27, 28 L Ed 923, 5 S Ct 357 (1885); Lindsley v Natural Carbonic Gas Co., 220 US 61, 55 L. Ed. 369, 31 S Ct. 337 (1911); Railway Express Agency v New York, 336 US 106, 93 L Ed. 533, 69 S Ct 463 (1949); McDonald v Board of Election Commissioners, 394 US 802, 22 L Ed 2d 739, 89 S Ct 1404 (1969). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 US 412, 415, 64 L Ed 989, 990, 40 S Ct 560 (1920). The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of §§ 15-312 and 15-314.

* * * *

"The objective of § 15-312 clearly is to establish degrees of entitlement of various classes of persons in accordance with their varying degrees and kinds of relationship to the intestate. Regardless of their sex, persons within any one of the enumerated classes of that section are similarly situated with respect to that objective. By providing dissimilar

> treatment for men and women who are thus similarly situated, the challenged section violates the Equal Protection Clause. [Citation omitted.]"
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> *Reed v. Reed*, 404 U.S. 71, 75-77.

Thus, in *Reed*, a case involving a statute which provided dissimilar treatment for males and females who were similarly situated, this Court found it unnecessary to apply the strict scrutiny required where suspect classifications or fundamental interests are involved.[16]

In *Police Department v. Mosley*, 408 U.S. 92 (1972), this Court struck down as violative of the Equal Protection Clause a municipal ordinance which made an impermissible distinction between labor picketing and other peaceful picketing. In so doing, the Court indicated that the standard enunciated in *Reed* is of broad applicability:

> "As in all equal protection cases, however, the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment. See Reed v Reed, 404 US 71, 75-77, 30 L Ed 2d 225, 229, 230, 92 S Ct 251 (1971); Weber v Aetna Casualty Co., 406 US 164, 31 L Ed 2d 768, 92 S Ct 1400 (1972); Dunn v Blumstein, 405 US 330, 335, 31 L Ed 2d 274, 280, 92 S Ct 995 (1972)."
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> *Police Department v. Mosley*, 408 U.S. 92, 95.

Even if sex is held to be a suspect classification when, as in *Reed* and *Frontiero*, the legislation under review

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[16]In *Frontiero v. Richardson*, 411 U.S. 677 (1973), this Court invalidated certain statutes insofar as they accorded different treatment to male and female members of the armed services for the sole purpose of achieving administrative convenience. Four members of this Court indicated that they consider sex to be a suspect classification; a majority, however, did not so hold.

discriminates between males and females similarly situated, the compelling state interest test is inappropriate in the instant case because Sections 2626 and 2626.2 of the California Unemployment Insurance Code do not create a classification based on sex. Those sections do not afford different treatment to women than they do to men. By treating maternity differently than illness or injury, they merely create rational, nonarbitrary classifications among the members of a single sex.[17]

This distinction was recognized in *Bravo v. Board of Education of City of Chicago*, 345 F.Supp. 155 (N.D. Ill. 1972), where the court granted a preliminary injunction enjoining enforcement of a maternity leave policy which established rigid periods of mandatory leave for pregnant school teachers. The court concluded that the plaintiff had shown a reasonable probability that the maternity leave policy denied pregnant teachers the equal protection of the laws. However, the court rejected plaintiff's contention that the policy constituted sex discrimination:

> "The Court disagrees with the plaintiff's assertion that § 4-37's classifications constitute sex discrimination and need not, therefore, pass on the difficult question of whether sex is an inherently suspect criterion. Plaintiff is actually criticizing two distinctions drawn by the Board's maternity leave policy. The first distinction challenged is that

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[17]The classification in *Gruenwald, supra*, at 15-16, afforded different treatment to men than to women similarly situated. Nevertheless, that classification was upheld because it was nonarbitrary and reasonably related to the objective of the legislation. *A fortiori*, the classification challenged here, which does not afford different treatment to women than it does to men, is valid so long as it is nonarbitrary and reasonably related to a legitimate governmental purpose.

made by the mandatory leave policy as between teachers who are required to stop working during their sixth and subsequent months of pregnancy and for two months thereafter, and all other teachers. The second distinction drawn into question is that made between teachers on maternity leave and those absent from duty on other types of leaves. These obviously do not involve criteria that can be characterized as suspect. * * * "

Bravo v. Board of Education of City of Chicago, 345 S.Supp. 155, 157.

Citing *Reed,* the court concluded that:

"[T]he traditional standard is applicable here, with the burden upon the plaintiff to show that the classifications in the Board's maternity leave policy are arbitrary and unreasonable and not based upon grounds of difference having a fair and substantial relation to a legitimate object of the Board."

Bravo v. Board of Education of City of Chicago, 345 F.Supp. 155, 157.

In *Rafford v. Randle Eastern Ambulance Service, Inc.,* 348 F.Supp. 316 (S.D.Fla. 1972), a case involving a charge of sex discrimination by male employees discharged due to their unkempt beards and mustaches, the court held:

"Virtually all Title VII violations fit an equal protection definition of sex discrimination—dissimilar treatment for similarly situated men and women, where the treatment is based on sex. Reed v. Reed, 404 U.S. 71, 77, ...

* * * *

"The discharge of pregnant women or bearded men does not violate the Civil Rights Act of 1964 simply because only women become pregnant and only men grow beards. In neither instance are similarly situated persons of the opposite sex favored. These cases are perhaps more properly considered under the rubric of Cooper v. Delta Air Lines, Inc., 274 F.Supp. 781 (E.D.La. 1967), that discrimination between different categories of the same sex is not unlawful discrimination by sex. This is a case of discrimination in favor of men who shave off their beards and moustaches. It does not involve proscribed sex discrimination."

Rafford v. Randle Eastern Ambulance Service, Inc., 348 F.Supp. 316, 320.

Accord, *Fagan v. National Cash Register Co.*, 481 F. 2d 1115 (D.C.Cir. 1973); *Boyce v. Safeway Stores, Inc.*, 351 F.Supp. 402 (D.D.C. 1972).

The portion of the California Unemployment Insurance Code here under consideration provides only that maternity benefits shall not be paid under California's disability insurance program. Therefore, it denies benefits only to certain members of the female sex. Sections 2626 and 2626.2 of the Code create two classifications of women: those who have normal pregnancies and those who do not have normal pregnancies. All women similarly situated receive identical treatment. Since pregnancy, normal or abnormal, is a condition unique to the female sex, Sections 2626 and 2626.2 do not treat differently men and women who are similarly situated. Therefore, those sections discriminate only between different classifications of the same sex and are not unlawful sex discrimination. Accordingly, they should

not be subjected to the compelling state interest test even if that test is adopted for cases involving legislation, such as that invalidated in *Reed* and *Frontiero*, which treats similarly situated members of the two sexes in a disparate manner.

B. The Statute Challenged Here Does Not Deny Due Process of Law if the Classification It Creates Does Not Needlessly, Arbitrarily or Capriciously Impinge Upon Constitutional Liberties.

The exclusion of maternity benefits from coverage under California's disability insurance program does not deny due process of law to pregnant workers. In *Gruenwald v. Gardner*, 390 F.2d 591 (2d Cir. 1968), *cert. den.* 393 U.S. 982 (1968), the court observed:

> "It is only the 'invidious discrimination' or the classification which is 'patently arbitrary [and] utterly lacking in rational justification' which is barred by either the 'due process' or 'equal protection' clauses. * * * A classification or regulation, on the other hand, 'which is reasonable in relation to its subject and is adopted in the interests of the community is due process.' * * *"
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> *Gruenwald v. Gardner*, 390 F.2d 591, 592.

The principles of due process enunciated in *Gruenwald* have recently been reiterated by this Court. In *Cleveland Board of Education v. LaFleur*, 42 U.S.L.W. 4186 (U.S. Jan. 21, 1974), this Court held that school board regulations which required pregnant teachers to commence unpaid maternity leave several months before the expected birth of the child created an irrebuttable presumption that all pregnant teachers became physically unable to perform their duties at a prescribed time before delivery. These regulations penalized the preg-

nant teacher for her decision to bear a child and thereby directly affected constitutionally protected freedoms.

Referring to the standards required by the Due Process Clause, the Court noted that:

> "[S]uch rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's constitutional liberty. The question before us in these cases is whether the interests advanced in support of the rules of the Cleveland and Chesterfield County School Boards can justify the particular procedures they have adopted."
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> *Cleveland Board of Education v. LaFleur*, 42 U.S.L.W. 4186, 4189.

Finding that the school boards' regulations denied pregnant teachers the due process of law, the Court held:

> "We thus conclude that the arbitrary cut-off dates embodied in the mandatory leave rules before us have no rational relationship to the valid state interest of preserving continuity of instruction. * * *
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> * * * *
>
> "[N]either the necessity for continuity of instruction nor the state interest in keeping physically unfit teachers out of the classroom can justify the sweeping mandatory leave regulations that the Cleveland and Chesterfield County School Boards have adopted. While the regulations no doubt represent a good-faith attempt to achieve a laudable goal, they cannot pass muster under the Due Process Clause of the Fourteenth Amendment, because they employ irrebuttable presumptions that unduly penalize a female teacher for deciding to bear a child."[18]

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[18]In *Hanson v. Hutt*, No. 42826 (Wash., Dec. 20, 1973), the Washington Supreme Court held violative of the Equal

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Cleveland Board of Education v. LaFleur, 42 U.S.L.W. 4186, 4190, 4191.

Thus, the exclusion of maternity benefits from coverage under California's disability insurance program does not deny due process of law if it bears a rational relationship to a valid state interest and does not needlessly, arbitrarily or capriciously impinge upon a vital area of constitutional liberty.

The remainder of this brief demonstrates that the exclusion of maternity benefits contained in Sections 2626 and 2626.2 of the California Unemployment Insurance Code is a rational, nonarbitrary classification, which bears a substantial relationship to a valid state interest. Further, it demonstrates that Sections 2626 and 2626.2 do not needlessly, arbitrarily or capriciously impinge upon any area of constitutional liberty nor do they create any irrebuttable presumptions which penalize women for choosing to bear a child. Those sections merely create a classification of a type which this Court has consistently upheld as within the proper discretion of the state legislature.

Protection Clause a section of the Washington State unemployment compensation law which denied benefits to pregnant women from the seventeenth week preceding the expected birth through the sixth week following delivery. The court held that classifications based on sex are suspect and, therefore, subject to strict judicial scrutiny. The State attempted to justify the classification by asserting that pregnant women are not genuinely attached to the labor market. Rejecting this contention, the Court noted that most women are able, despite pregnancy, to continue working in their normal occupations, and the length of time during which a woman cannot work following delivery is dependent on the individual woman. Therefore, the court's rationale, like that of this Court in *LaFleur*, was that the exclusion of benefits to all pregnant women for specified periods before and after delivery was overly broad and constituted an irrebuttable presumption of physical incompetency.

III.

Denial of Maternity Benefits Under the California Unemployment Insurance Code Is a Reasonable, Nonarbitrary Classification Because Normal Gestation and Delivery Is Not a Sickness or Injury.

Section 2601 of the California Unemployment Insurance Code states that the purpose of the Code is to compensate "in part" for the wages lost by individuals unemployed by "sickness or injury." Similarly, Section 2626 defines "disability" to include "both mental or physical illness and mental or physical injury."[19]

Under California's disability insurance program, benefits are provided for legitimate sickness or injury, including those maladies which are suffered solely or mainly by women.[20] The exclusion of maternity benefits from the disability compensation provisions of the California Unemployment Insurance Code is reasonable, nonarbitrary and does not discriminate against women because a normal, uncomplicated pregnancy is not a sickness or injury, and, therefore, is not the type of disability which California's disability insurance program is designed to alleviate.

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[19]See page 12, note 12, *supra*.

[20]While certain cosmetic plastic surgery is covered by California's disability insurance program, coverage for such surgery is limited to cases involving disabling disfigurement. Section 2626 of the Code provides that an individual is deemed disabled when, due to his "mental or physical condition" he is unable to perform his regular or customary work. Section 2708 of the Code provides that claims for disability must be supported by the certificate of a physician; the physician must state the medical facts within his knowledge and his conclusions with respect to the claimant's disability. Cosmetic plastic surgery is covered by state disability insurance only when a physician concludes that, due to the emotional trauma arising from his disfigurement, the claimant is disabled from performing his regular or customary work. Such disabilities are deemed to arise from the claimant's "mental condition" within the meaning of Section 2626 of the Code.

The California courts have recognized the distinction between maternity benefits and disability benefits for the sick and injured. In *Clark v. California Employment Stabilization Commission,* 166 Cal.App.2d 326, 332 P.2d 716 (1958), plaintiff attacked former Section 2626 of the California Unemployment Insurance Code claiming that that provision subjected her to an arbitrary classification, deprived her of the equal protection of the laws, and denied her due process of law. The court upheld Section 2626 stating:

> "The purpose of the unemployment disability program is to afford relief to employees sustaining loss of wages on account of illness, and not to confer maternity benefits. * * *
>
> "Also, it should be noted that the statute confines relief to loss on account of illness or injury. * * *"
>
> *Clark v. California Employment Stabilization Commission,* 166 Cal.App.2d 326, 332 P.2d 716, 719.

In *Rentzer,*[21] the court again recognized the distinction between maternity benefits and benefits of the type which California's disability insurance program was designed to provide. The court based its holding that the petitioner was entitled to disability benefits on the fact that:

> ". . . Rentzer's disability was not an ordinary maternity disability involving preparation for and recuperation from normal gestation and delivery. * * *"
>
> *Rentzer v. California Unemployment Insurance Appeals Board,* 32 Cal.App.2d 604, 607, 108 Cal.Rptr. 336.

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[21]See page 11, *supra.*

Judge Williams, in his dissent from the District Court's denial of Appellant's Motion to Reconsider and Set Aside Summary Judgment, noted that pregnancy cannot be considered a sickness or injury:

> "If the majority looks upon a normal, healthy pregnancy as a mental or physical illness or injury, then I believe it has gone a long way in establishing a more offensive stereotype than any previously feared by plaintiffs. If the majority has chosen instead to characterize pregnancy as a 'physical or mental *condition*' (§ 2626, second sentence, emphasis added) having nothing to do with injury or illness, it does so only by ignoring the obvious coloring of the definition of 'condition' lent by the 'injury' and 'illness' language of the first sentence. And if this is the court's holding, then it has bestowed upon women workers in California a *maternity* insurance program never contemplated by the California legislature or courts."
>
> Jurisdictional Statement of Appellant, Appendix D at 33.

The distinction between maternity and sickness or injury is consistent with medical opinion and with the way in which our society views the condition of pregnancy. In J. McKinlay, *The Sick Role—Illness and Pregnancy*, 6 Social Sci. & Medicine 561 (1972), the author concludes that normal pregnancy, consisting of "an uneventful gestation and parturition" without "resulting obstetric or delivery complications", is not an illness and is not considered as such in American so-

ciety. Mr. McKinlay first notes that pregnancy is, unlike illness, a normal condition because:

> "*Firstly*, pregnancy can be considered statistically normal in that most of the population of possible conceivers at some time (usually several times) are in this state. One cannot claim that illnesses, like cancer, coronary thrombosis or pneumonia, are 'normal' in this sense. Most of the population at risk do not develop heart and respiratory conditions or become afflicted with cancer. Indeed, if they did, these states would most likely be considered as 'facts of life' or 'natural vicissitudes' (as is pregnancy) rather than as illness conditions.
>
> "*Secondly*, pregnancy can quite reasonably be considered 'normal' in the sense that it is a necessary biological function for the survival of the species. Its importance is manifest in the fact that society mobilizes financial and manpower resources to ensure that those who are in this state do not develop complications and become sick. Illness can never be viewed in the same way as a necessary biological process for survival. Indeed, in some forms it can even jeopardize survival.
>
> "*Thirdly*, pregnancy can be considered 'normal' because it is often thought to be a desirable state of affairs. For instance, one often congratulates a women [sic] when one finds out that she is 'expecting'. On the other hand, women who do not conceive are often considered to be in some ways abnormal and sanctions, often in the form of stigma, are applied.

"*Fourthly*, . . .

"Illness is defined as having two related aspects. It is said to involve both a disturbance of a biological state and, at some point, a disruption of role obligations. Pregnancy, it is true, may involve both these aspects at some time. It differs from illness, however, to the extent that it calls forth in both the woman, and her significant others, a set of responses which are in many ways different from those elicited with the onset of an illness. * * *"

J. McKinlay, The Sick Role—Illness and Pregnancy, 6 Social Sci. & Medicine 561, 568.

Having concluded that pregnancy is a normal condition, Mr. McKinlay considers whether it can be considered an illness and concludes that it cannot:

"*Firstly*, can the pregnant women be said to be allowed exemption from the performance of normal social-role obligations? It seems that it is seldom the case that a woman, by becoming pregnant, is automatically relieved of her obligation to fulfill certain role requirements. Indeed, it is not uncommon for women, during gestation, to experience what is termed 'role overload'—when too many expectations, all with pressures for performance, converge on one individual at the same time. By developing or 'manufacturing' a symptom or set of symptoms (e.g. high blood pressure, oedema or nausea) and thus making herself a candidate for the sick role, a pregnant woman in our society may attempt to negotiate herself into a sick role in order to relieve this social pressure. * * *

"*Secondly*, is the pregnant woman allowed exemption from responsibility for her 'condition'? It is often the case that a couple actually want a child and do everything in their power to encourage conception. Indeed, unless conception is actively discouraged, it is difficult for the woman to claim that she is not responsible for her condition. Yet, this exemption from responsibility, according to Parsons, is a prerequisite for eligibility for the sick role. It is precisely because one does not deliberately and continuously expose oneself to tuberculosis or typhoid, with the intention of contracting the disease, that one is not considered culpable for one's state.

"*Thirdly*, can we claim that the pregnant woman must be motivated to get well? It is usually assumed that illness is an undesirable state or an incapacity which, as quickly as possible, must be reversed by some kind of therapeutic action. Implicit in the concept of illness then, is the notion of cure. It has already been suggested that pregnancy is often intended and thought to be a desirable condition. Seldom do we talk of 'curing' pregnancy, nor do we act so as to help a pregnant woman 'get well'. The obligation to 'get well as soon as possible' while applicable to undesirable illness states, cannot be considered relevant to a normal state, such as pregnancy.

"*Fourthly*, can we claim that the pregnant woman is obliged to seek 'technically competent help'? There are sometimes severe sanctions applied to individuals who have an illness condition but who do not seek advice from, or cooperate with medical experts. In these cases one is usually already

ill and decides (or is advised) to see a professional. These cases are, in other words, curative. The maternity services, being largely preventive, are of an entirely different category and reflecting a somewhat different orientation. There is no real obligation to seek professional help. * * *

* * * *

"The foregoing discussion suggests that although women who are pregnant occupy a special position in society and in certain situations fulfil unique expectations, this *normal* state cannot be considered an illness, . . ."

J. McKinlay, The Sick Role—Illness and Pregnancy, 6 Social Sci. & Medicine 561, 568-569, 570.

The normality of pregnancy which distinguishes it from sickness or injury was recognized by Mr. Justice Powell concurring in this Court's recent decision in *Cleveland Board of Education v. LaFleur*, 42 U.S.L.W. 4186 (U.S. Jan. 21, 1974), in which he stated:

"[P]regnancy is a normal biological function possessing, in the great majority of cases, a fairly well defined term. * * *"

Cleveland Board of Education v. LaFleur, 42 U.S.L.W. 4186, 4192.

The basis of the majority opinion in *LaFleur* (the personal right to plan one's family) itself undercuts the contention that pregnancy is a disability like sickness or injury.

Newmon v. Delta Air Lines, Inc., Civil Action No. 15681 (N.D.Ga. Dec. 31, 1973), was a class action brought pursuant to Title VII of the Civil Rights Act

of 1964, 42 U.S.C. §§ 2000e, *et seq.*[22] The plaintiff alleged sex discrimination in the effectuation and operation of defendant's maternity leave policy. Plaintiff had been required to begin unpaid maternity leave at the end of her fifth month of pregnancy, and, while on such leave, she was not entitled to disability pay, accrual of seniority, group medical insurance benefits, or sick leave. The court first held that the mandatory maternity leave was a form of proscribed sex discrimination.

The court then addressed the question whether defendant violated the Civil Rights Act by denying its pregnant employees disability pay and other employment benefits while on maternity leave. Holding that such denial of benefits was not discriminatory on the

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[22]In *Wetzel v. Liberty Mutual Insurance Co.*, Civil Action No. 72-169 (W.D.Pa. Jan. 9, 1974), the court held the defendant's income protection plan violative of Title VII. The plan provided for continuation of income during "long term illness", and it excluded benefits for disabilities due to occupational injury, sickness covered by workmen's compensation insurance or pregnancy. The court held that Title VII standards were more strict than those of the Equal Protection Clause "in view of the express statutory mandate upon employers and the absence of the question of a 'rationale basis' for classification by which a state statute is measured." The court recognized pregnancy as a natural, foreseeable and "ultimately necessary" condition and noted that it was the only disability not within the other exceptions which was not covered by the income protection plan. Finally, the court noted that conditions limited to men, such as prostate troubles, were not excluded from coverage.

The court in *Wetzel* failed to recognize the crucial distinction between maternity and sickness. California's disability insurance program covers legitimate sickness and injury regardless of sex. It covers conditions such as prostate problems which are limited to men as well as those such as ectopic pregnancies which are suffered only by women. Because it covers only disabilities arising from sickness and injury, however, it excludes maternity which is neither sickness nor injury.

basis of sex, the court recognized the difference between pregnancy and illness or injury:

> "In the trial, both parties offered the testimony of highly qualified physicians—obstreticians [sic], gynecologists, hematoligists [sic] and psychiatrists in support of their respective positions. * * *
>
> * * * *
>
> "Whether the plaintiff and her class are the victims of discrimination because of sex depends on the definition of pregnancy. After careful consideration of the evidence, including the medical testimony, it must be concluded that pregnancy is neither a sickness nor a disability. In the first place, pregnancy is, in most cases, a voluntarily imposed condition and the fact of its existence demonstrates that a woman is quite healthy and normal, since sick is defined as 'affected with disease; not well or healthy, ill, ailing, indisposed.' Webster's Third International Dictionary, Unabridged (1969) at p. 2110. A reasonable approach dictates the holding that pregnancy is not sickness in the usual sense of the word."
>
> *Newmon v. Delta Air Lines, Inc.*, Civil Action No. 15681, at pp. 11, 13-A to 14.

As the Court noted in *Newmon*, pregnancy is further distinguished from disease by the element of voluntariness. Judge Haynsworth observed in *Cohen v. Chesterfield County School Board*, 474 F.2d 395, 398 (4th Cir. 1973), *rev'd on other grounds, Cleveland Board of Education v. LaFleur*:[23]

> "Even pregnancy is not like illnesses and other disabilities. In this age of wide use of effective

[23] 42 U.S.L.W. 4186 (U.S. Jan. 21, 1974). See p. 22, *supra*.

contraceptives, pregnancy is usually voluntary. No one wishes to come down with mononucleosis or to break a leg, but a majority of young women do wish to become pregnant, though they seek to select the time for doing so. * * *

"Unlike most illnesses and other disabilities, too, pregnancy permits one to foresee its culmination in a period of confinement and to prepare for it. * * *"

Cohen v. Chesterfield County School Board, 474 F.2d 395, 398.

Since pregnancy is neither a sickness nor an injury, pregnant employees and those who have contracted a sickness or suffered an injury are not similarly situated. As this Court reiterated in *Reed v. Reed*,[24] the Equal Protection Clause of the Fourteenth Amendment does not deny the states "the power to treat different classes of persons in different ways." It merely denies the states the power "to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute."

Pregnant women are placed into a classification unlike that of the sick and injured by medical and biological fact. Sections 2626 and 2626.2 of the California Unemployment Insurance Code recognize the distinction between maternity and sickness or injury and differentiate only between persons who are not similarly situated. Therefore, the denial of maternity benefits under the disability insurance program is based upon a reasonable, nonarbitrary distinction between maternity and sickness or injury.

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[24]See pp. 16-18, *supra*.

The concluding section of this brief demonstrates that the classification made by Sections 2626 and 2626.2 satisfies the *Reed* test because it is reasonable, nonarbitrary, serves a legitimate governmental interest and "rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation." It further demonstrates that the exclusion of maternity benefits from California's disability insurance program does not deny due process of law. That exclusion satisfies the *LaFleur* test because it does not needlessly, arbitrarily, or capriciously impinge upon constitutional liberties.

IV.

The Exclusion of Maternity Benefits From Disability Insurance Coverage Is Rationally Based, Free From Invidious Discrimination, and Serves a Legitimate Governmental Purpose.

As set forth in California Unemployment Insurance Code Section 2601, the disability provisions of the Code are intended to provide partial compensation for wages lost due to injury or illness. Therefore, this legislation falls within what this Court has characterized as the area of economics and social welfare.

In *Dandridge v. Williams*, 397 U.S. 471 (1970), this Court made clear that states are free in the area of economics and social welfare to make classifications so long as they are rationally based and free from invidious discrimination. In *Dandridge* plaintiffs attacked the method used by Maryland in administering an aspect of its public welfare program. Maryland imposed an upper limit on the amount of money any family could receive under the Aid to Families With Dependent Children program. Plaintiffs claimed that this poli-

cy discriminated against large families whose needs exceeded the upper limit of the welfare program and that such discrimination violated the Equal Protection Clause of the Fourteenth Amendment. This Court upheld Maryland's allocation program stating:

> "[H]ere we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants of welfare payments to the largest AFDC families. For this Court to approve the invalidation of state economic or social regulation as 'overreaching' would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought.' Williamson v Lee Optical Co., 348 US 483, 488, 99 L Ed 563, 572, 75 S Ct 461. That era long ago passed into history. Ferguson v Skrupa, 372 US 726, 10 L Ed 2d 93, 83 S Ct 1028, 95 ALR2d 1347.
>
> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' Lindsley v National Carbonic Gas Co., 220 US 61, 78, 55 L Ed 369, 377, 31 S Ct 337. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may

be, and unscientific.' Metropolis Theatre Co. v City of Chicago, 228 US 61, 69-70, 57 L Ed 730, 734, 33 S Ct 441. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' McGowan v Maryland, 366 US 420, 426, 6 L Ed 2d 393, 399, 81 S Ct 1101.

"[W]e can find no basis for applying a different constitutional standard. * * * And it is a standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.

* * * *

"[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. Lindsley v Natural Carbonic Gas Co., 220 US 61, 55 L Ed 369, 31 S Ct 337. It is enough that the State's action be rationally based and free from invidious discrimination. The regulation before us meets that test.

"[T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients. * * *"

Dandridge v. Williams, 397 U.S. 471, 484-487.

Similarly, in *Jefferson v. Hackney*, 406 U.S. 535 (1972), plaintiffs attacked the formula whereby Texas allocated its available welfare funds among classes of recipients. Under the Texas system the elderly received 100 percent of the full standard of need, the blind and

disabled received 95 percent, and those receiving benefits under the Aid to Families With Dependent Children program received only 75 percent of the standard of need. Plaintiffs claimed that this system denied them the equal protection of the laws because a larger percentage of Blacks and Mexican-Americans participated in the Aid to Families With Dependent Children program than in the other programs.

Rejecting plaintiffs' argument and holding that Texas' allocation system was constitutionally valid, this Court held:

> "This Court emphasized only recently, in Dandridge v Williams, 397 US 471, 485, 25 L Ed 2d 491, 501, 90 S Ct 1153 (1970), that in 'the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.' A legislature may address a problem 'one step at a time,' or even 'select one phase of one field and apply a remedy there, neglecting the others.' Williamson v Lee Optical Co. 348 US 483, 489, 99 L Ed 563, 573, 75 S Ct 461 (1955). So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them.
>
> * * * *
>
> "The acceptance of appellants' constitutional theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational

the treatment might be. Few legislative efforts to deal with the difficult problems posed by current welfare programs could survive such scrutiny, and we do not find it required by the Fourteenth Amendment.

"Applying the traditional standard of review under that amendment, we cannot say that Texas' decision to provide somewhat lower welfare benefits for AFDC recipients is invidious or irrational. Since budgetary constraints do not allow the payment of the full standard of need for all welfare recipients, the State may have concluded that the aged and infirm are the least able of the categorical grant recipients to bear the hardships of an inadequate standard of living. While different policy judgments are of course possible, it is not irrational for the State to believe that the young are more adaptable than the sick and elderly, especially because the latter have less hope of improving their situation in the years remaining to them. Whether or not one agrees with this state determination, there is nothing in the Constitution that forbids it.

* * * *

"In conclusion, we re-emphasize what the Court said in Dandridge v. Williams, 397 US, at 487, 25 L Ed 2d at 503:

" 'We do not decide today that the [state law] is wise, that it best fulfills the relevant social and economic objectives that [the State] might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly

including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. * * *' "

Jefferson v. Hackney, 406 U.S. 535, 546-551.

In *New York State Department of Social Services v. Dublino*, ... U.S. ...., 93 S.Ct. 2507 (1973), this Court reversed a lower court decision invalidating the Work Rules of New York's Social Welfare Law stating:

"It could impair the capacity of the state government to deal effectively with the critical problem of mounting welfare costs and the increasing financial dependency of many of its citizens. * * * To the extent that the Work Rules embody New York's attempt to promote self-reliance and civic responsibility, to assure that limited state welfare funds be spent on behalf of those genuinely incapacitated and most in need, and to cope with the fiscal hardships enveloping many state and local governments, this Court should not lightly interfere. The problems confronting our society in these areas are severe, and state governments, in cooperation with the Federal Government, must be allowed considerable latitude in attempting their resolution."

New York State Department of Social Services v. Dublino, 93 S.Ct. 2507, 2513 (1973).

See also *United States v. Kras*, 409 U.S. 434 (1973); *Richardson v. Belcher*, 404 U.S. 78 (1971).

The disability insurance provisions of the California Unemployment Insurance Code meet the standards for economic and social welfare legislation set forth in *Dan-*

dridge, Jefferson and *Dublino*. Those cases hold that the California State Legislature may address the problems of unemployment "one step at a time" and "select one phase of one field and apply a remedy there, neglecting the others." The Legislature has chosen to alleviate the burdens of unemployment caused by sickness and injury through its program of disability insurance. In order to provide adequate benefits to the sick and injured, the Legislature has determined that maternity benefits must be excluded from coverage. As Judge Williams noted in his dissent from the District Court's opinion, it would cost more than $120,000,000 and require a 30 percent increase in revenues to provide maternity benefits to the estimated 210,000 eligible recipients in California. *Aiello v. Hanson*, 359 F.Supp. 792, 802 n.2 (N.D.Cal. 1973).

In the area of disability benefits, as with other social welfare programs, economic considerations are, of necessity, a major subject of concern and a legitimate governmental interest. In 1946, Governor Earl Warren proposed to the legislature the creation of the disability insurance program. His message demonstrated that the cost of the program had received careful scrutiny:

> "[W]e have had eight years of experience, and this experience demonstrates that disability compensation can be made available to workers without affecting the solvency of the fund and without the necessity for an additional contribution from anyone.
>
> * * * *
>
> "The basic idea on which the Unemployment Insurance Program was based, was that the cost of involuntary unemployment should be borne by the economic system as a whole.

"The purposes of the program were two-fold: First, to reduce to a minimum involuntary unemployment, the suffering caused thereby, and the resulting decline of purchasing power, and second, to avoid the necessity for resorting to costly relief programs.

* * * *

"Employee contributions, when they are required, must be borne entirely by the individual worker, because, unlike the case of the employer there is no one to whom the worker can pass the burden. His contribution is really in the nature of a gross income tax, as distinguished from what is merely an excise tax as far as the employer is concerned.

"Therefore, it is primarily on the ground of financial necessity that the employee's contribution toward the financing of the unemployment insurance can be justified.

* * * *

"Unemployment resulting from illness or disability is a risk faced by all workers. Sickness or injury of a worker, when nonoccupational in character and therefore not compensable under the Workman's Compensation Act, deprives the worker and his family of their primary source of income, the pay check, at a time when income is most needed.

"When sickness strikes down the breadwinner, living expenses continue just the same, and, in addition, there is often extra expense occasioned by the illness itself.

* * * *

"It is not possible for employees to obtain from private insurance companies protection against loss of wages or salary during sickness as adequately or cheaply as that protection could be obtained by diverting their present 1 per cent contribution for the support of a Disability Benefits Program.

* * * *

"Based on Rhode Island's actual experience, and with allowance for differences between the Rhode Island Law and the program now under consideration for California, the cost in California would approximate $35,000,000 a year.

"This cost could be met entirely out of the 1 per cent employee contribution. * * *"[28]

The California courts have recognized the economic necessity of the exclusion of maternity benefits contained in Section 2626 of the Unemployment Insurance Code. Recognizing the State's legitimate interest in maintaining the solvency of its programs, they have

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[28]California Senate Journal, June 23, 1946, at pp. 228-229. Governor Warren's reference to Rhode Island's experience demonstrates that those who planned the California Disability Insurance Program were well aware of the heavy financial burden which maternity benefits place on such a program. Originally, maternity benefits were covered in the Rhode Island plan. During the first benefit year, 4,310 women received over $652,000 in benefits under the program. Rhode Island's program began in 1944, and by mid-1946 it had incurred a deficit of nearly one and one-half million dollars. Payments in pregnancy cases amounted to more than double the payments in workmen's compensation cases from Rhode Island's disability fund. In 1946, the Rhode Island program was amended with respect to pregnancy cases. This amendment provided that, except for "unusual complications arising as a result of childbirth," no person could receive benefits for more than 15 weeks for unemployment due to pregnancy. N. Sinai, Disability Compensation for the Disabled Sick 29-31 (1949).

upheld that section as creating a classification reasonably designed to achieve the objectives of the legislation. In *Clark v. California Employment Stabilization Commission*, 166 Cal.App.2d 326, 332 P.2d 716 (1958), the court discussed the legislature's reasons for excluding maternity benefits from disability coverage:

> "The exclusionary provisions in question are part of a legislative program conferring unemployment compensation disability benefits upon a defined group of employees. Persons sustaining disability caused by pregnancy, by the terms of the statute, are not within this group. * * * Whether such disability benefits should be extended to pregnant women is a matter solely for legislative determination, and is not within the scope of judicial decision.
>
> * * * *
>
> "Without doubt, the rate of employee contributions is related directly to the demand made upon the Fund, which, in turn, is affected by the extent of the coverage provided. It is a matter of common knowledge that illness or injury arising from pregnancy is classified and excluded from the coverage provided by private contracts of health and accident insurance, in order to effect a premium rate lower than is required in the absence of such an exclusion. It is reasonable to assume that the inclusion of illness or injury caused by pregnancy within the coverage provided by the statute would increase substantially the demands upon the Fund and require a like increase in the contribution rate. As these conclusions are

within reason, the inquiry into conditions establishing them is a matter for the Legislature, as is also the determination respecting the relative merits of inclusion or exclusion in comparison with the incident contribution rate. It was properly within the sphere of legislative action to determine whether the objects of the statute in question would be served best by including a disability benefit which reasonably might impose upon the majority of employees a burden disproportionate to contemplated benefits, in order to favor the minority who are included within the classified group. These reasons indicate that the class excluded was not arbitrarily selected, and that the purpose of the exclusion was germane to the legislative object.

"Moreover, to award disability compensation to women employees on account of illness caused by pregnancy, in effect, constituted a maternity benefit plan for a limited group, i.e., women employees. The purpose of the unemployment disability program is to afford relief to employees sustaining loss of wages on account of illness, and not to confer maternity benefits. * * *"

Clark v. California Employment Stabilization Commission, 166 Cal.App.2d 326, 329-332, 332 P.2d 716, 719.

Accord, Rentzer v. California Unemployment Insurance Appeals Board, 32 Cal.App.3d 604, 108 Cal.Rptr. 336 (1973).

California's disability insurance program is only one part of the State's comprehensive social welfare plan.

Workmen's compensation insurance,[26] unemployment insurance,[27] aid to the elderly,[28] aid to the blind,[29] and aid to families with dependent children[30] are some of the other means whereby California seeks to alleviate certain misfortunes which may befall its residents. Each such program is designed and intended to assist only persons suffering certain narrowly defined hardships. California's disability insurance program is intended solely to compensate in part for disability arising from sickness or injury. Neither California nor any other state has the financial resources to alleviate each and every type of hardship experienced by its residents. Accordingly, California has not undertaken to provide maternity benefits under any of its social welfare programs. This decision is based on a rational, nonarbitrary distinction between pregnancy and other conditions which may befall California residents.

The exclusion of maternity benefits from California's disability insurance program is one manner in which the California Legislature has attempted to meet its

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[26]California Labor Code §§ 3201 *et seq.* (West, 1971).

[27]California Unemployment Insurance Code §§ 100 *et seq.* (West, 1972).

[28]California Welfare and Institutions Code §§ 12000 *et seq.* (West, 1972).

[29]California Welfare and Institutions Code §§ 12500 *et seq.* (West, 1972).

[30]California Welfare and Institutions Code §§ 11200 *et seq.* (West, 1972).

Under the Aid to Families With Dependent Children Program, needy pregnant women, including those with no other children, may receive support without regard to their marital status. California Department of Social Welfare Manual of Policies and Procedures, 44-213.3.

responsibility of "allocating limited public welfare funds among the myriad of potential recipients." It has taken "one step at a time"; it has selected "one phase of one field and applied a remedy there." This decision of the Legislature is rationally based and does not involve invidious discrimination. It therefore meets the standards set forth in *Dandridge*, *Jefferson* and *Dublino* for legislation within the area of economics and social welfare.

The classification contained in Sections 2626 and 2626.2 of the Code is reasonable, nonarbitrary, and bears a substantial relation to the legitimate governmental purpose of maintaining the fiscal integrity of the disability insurance program. Therefore, the classification satisfies the *Reed* test and does not deny the equal protection of the laws. Similarly, while advancing legitimate state interests, the exclusion of maternity benefits satisfies the *LaFleur* standard because it does not needlessly, arbitrarily or capriciously impinge on constitutionally protected liberties. Nor does it create any irrebuttable presumptions which unduly penalize women who decide to bear children. Sections 2626 and 2626.2 of the Code merely express California's decision not to pay maternity benefits under an insurance program designed to assist the sick and injured. Therefore, those sections do not deny due process of law. Accordingly, the exclusion of maternity benefits contained in Sections 2626 and 2626.2 of the California Unemployment Insurance Code is a valid classification and is not violative of the Constitution of the United States.

Conclusion.

The cases of Appellees Aiello, Armendariz and J[illegible] son have become moot and should be dismissed [illegible] vacated and remanded for consideration of the m[illegible] ness issue.

The District Court reached its decision in the c[illegible] of Appellee Jaramillo without realizing that nor[illegible] pregnancy is not a sickness or injury. Failing to rec[illegible] nize the crucial distinction between normal pregn[illegible] and the disabilities which California's disability i[illegible] ance program was designed to alleviate, the Di[illegible] Court erroneously ruled that maternity benefits mu[illegible] paid under that program. The Associations and [illegible] Employers therefore urge that the District Court's [illegible] cision in Appellee Jaramillo's case be reversed.

Dated: February 8, 1974.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-640

DWIGHT GEDULDIG,

Appellant,

v.

CAROLYN AIELLO, individually and on behalf of all others similarly situated,

Appellees.

DWIGHT GEDULDIG,

Appellant,

v.

AUGUSTINA D. ARMENDARIZ, ELIZABETH B. JOHNSON, JACQUELINE JARAMILLO, individually and on behalf of all other women similarly situated,

Appellees.

CONSOLIDATED CASES ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Physicians Forum respectfully moves for leave to file a brief *amicus curiae* in this case. Counsel for Appellees has consented to the filing of the brief; counsel for Appellant has declined to consent.

The Physicians Forum is a national voluntary membership organization of physicians which, in its thirty

years of existence, has concerned itself with the quality and availability of medical care in the United States. It has actively advocated programs which would deliver health care services to all people of the United States without barriers based on discriminatory policies or on the financial ability of the patient.

We believe that the case at bar is of special significance. Without doubt the outcome will directly influence the development of disability programs throughout the nation. Inasmuch as any disability program which denies compensation for pregnancy-related disabilities can lead to impairment of the health of the prospective mother and child, the health of millions of working women of this nation and their children will be affected by the decision.

We submit that the enclosed brief will be of assistance to the Court in resolving the crucial questions before it. It discusses, from a point of view different from that of the parties, the medical reasons which support the inclusion of pregnancy-related disabilities in the California disability program, and it explains why a woman unable to work because of medically certifiable conditions hazardous to her health or that of the fetus should be compensated under the program. In so doing, it seeks to demonstrate that the California statute and the policies implementing it are based upon stereotypic assumptions about pregnancy-related disabilities which do not have a basis in medical fact.

For these reasons, we respectfully request leave to file the within brief *amicus curiae*.

Respectfully submitted,

HARRY I. RAND
Attorney for Movant

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CONSOLIDATED CASES ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF THE PHYSICIANS FORUM AS *AMICUS CURIAE*

Interest of *Amicus*

The interest of *Amicus* is set out in the preceding motion for leave to file this brief.

Statement

The named plaintiffs in these cases are four women who must work to support themselves and their families. Each woman experienced a period of time during which she was physically unable to work because of disabilities arising out of pregnancy: in the cases of Ms. Aiello and Ms. Johnson, ectopic pregnancies; in the case of Ms. Armendariz, a miscarriage; and in the case of Ms. Jaramillo, the effects of a normal delivery of a child. The periods of disability were approximately five weeks, seven weeks, three weeks, and seven and one-half weeks, respectively. *Aiello* v. *Hansen*, 359 F. Supp. 792, 795 (N.D. Cal. 1973). During those periods, they were unable to work and did not receive the regular income from their jobs.

They looked to another source of funds to ease the financial strains caused by this loss of wages—the California disability insurance program. The broad purpose of the program is "to compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury and to reduce to a minimum the suffering caused by unemployment resulting therefrom." California Unemployment Insurance Code [hereinafter referred to as "U.I.C."] § 2601. The specific test for disability is set forth in the statute: "An individual shall be deemed disabled in any day in which, because of his [or her] physical or mental condition, he [or she] is unable to perform his [or her] regular or customary work." U.I.C. § 2626. Plaintiffs met this test, but they were nevertheless denied benefits under the only express statutory exclusion: "In no case shall the term 'disability' or 'disabled' include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter." *Id.*

Plaintiffs commenced these actions to challenge that exclusion as discriminatory. A three-judge court, in a well-reasoned opinion, held that the challenged exclusion denied equal protection to workers who suffered pregnancy-related disabilities and enjoined its enforcement. *Aiello* v. *Hansen*, 359 F. Supp. 792 (N.D. Cal. 1973). The State of California moved for reconsideration after the statute was amended, effective January 1, 1974, but reconsideration was denied. The State of California has appealed to this Court.

ARGUMENT

I.

Whether pregnancy per se is a "disease" or "injury" is not at issue; it is a condition from which disability may and usually does arise, even when the pregnancy is "normal."

The State places great emphasis on the words "illness" and "injury," quoting those words from a 1946 gubernatorial message to the State legislature recommending establishment of a disability compensation program (Brief for Appellant at 10) and from the California statute itself (*Id.* at 8, 17-24) and takes the position that so-called "normal" pregnancy, *i.e.*, uncomplicated pregnancy, is not an "illness" or an "injury" and therefore cannot and should not be compensated under the program.

Pregnancy per se is not an injury or an illness, but that is not the question here. The issue, rather, is whether *disabilities* related to pregnancy and childbirth should be covered by the California program. Although the statute provides that the terms "disability" and "disabled" in-

clude both mental and physical illness or injury,[1] the statutory test for disability is a functional one, related to the ability to perform regular or customary work. The test accords with the purpose of the statute. (See discussion, *infra*, at pp. 9-13). There is no doubt that childbirth always causes, and that pregnancy may cause, such disability. The statute as amended covers most disabilities arising out of other than normal pregnancy and childbirth, including ectopic (tubal) pregnancy, from which two of the plaintiffs suffered, and presumably miscarriage, from which a third plaintiff suffered.[2] Therefore, the dispute here is whether disabilities arising out of normal pregnancy and childbirth constitutionally may be excluded from coverage.

The court below suggested that the State improperly relied upon stereotypes concerning pregnancy and childbirth in formulating its policy of exclusion:

> "[T]he denial of benefits for pregnancy-related disabilities seems to have its roots in the belief that all pregnant women are incapable of work for long periods of time, and therefore, they will submit large disability claims. The truth of this belief is certainly suspect." (359 F. Supp. at 799)

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[1] Obviously, the legislative intent was to assure that both mental *and* physical conditions be covered.

[2] As written, the amended statute would not seem to cover disabilities arising out of most "elective" abortions, including abortions necessitated by rape, incest, financial inability to care for more children, mental or physical inability to bear or to care for more children, or malformation of the fetus. Yet, the statute was amended *after* this Court declared that a woman has a constitutional right to choose not to bear a child. *Roe* v. *Wade*, 410 U.S. 113 (1973); *Doe* v. *Bolton*, 410 U.S. 179 (1973). Such an exclusion could not be based on financial considerations, since most abortions are performed in the first trimester of pregnancy and can be done on an out-patient basis, causing less than one day of disability.

We agree. The actual length of disability varies with the age, general health, number of previous pregnancies, and type of job of the particular woman involved. Most women whose pregnancies are uncomplicated are not disabled from working until they go into labor.[3] Women physicians and nurses commonly work until the onset of labor, even though their duties are relatively strenuous compared, for example, to those of an office worker. Of course, if a woman's customary job is of a type which cannot or should not be performed by a woman in the advanced stages of pregnancy, it might be necessary for the woman to leave her job earlier.

Most women become disabled soon after labor contractions begin. These contractions, unlike other physiologic muscular contractions, are painful;[4] they continue throughout labor (which averages thirteen hours for a woman having her first child and eight and one-half hours for others)[5] and often even after delivery. Moreover, during delivery, the birth passages are lacerated,[6] and proper medical care dictates that "[t]he vulva, vagina, and uterus should be regarded as an open wound following labor and during the early days of the puerperium [period of time following labor in which the maternal organs return to their normal size and condition], and every precaution should be taken to protect the patient against infection."[7]

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[3] This is especially true concerning primagravidas (women who are giving birth for the first time). See affidavits of Drs. Goldstein and Trueblood, which appear in the Appendix submitted by the parties to this appeal [hereinafter cited as Appendix] at pp. 38-40.

[4] Eastman and Hellman, Williams Obstetrics 358 (13th ed. 1966) [hereinafter cited as Williams].

[5] Williams at 397-401.

[6] Taylor, Beck's Obstetrical Practice 572 (8th ed. 1966), Chapter 44: *Repair of Lacerations* [hereinafter cited as Beck]; Williams at 479.

[7] Beck at 214.

An episiotomy is usually performed to avoid perineal tear.[8] Blood loss results,[9] surgical repair is necessary, and the area must be allowed to heal so that accidental rupture will be prevented. Additionally, separation of the placenta from the uterine wall (the "afterbirth") creates a wound on the inner surface of the uterus,[10] which will heal normally with rest and proper care.

These conditions are merely illustrative of the many disabling physical changes which occur during normal pregnancy and childbirth.

When a woman can safely return to work after childbirth varies from one individual to another. A new mother is generally discharged from the hospital 72 hours after delivery. A short period of recuperation at home usually follows. Although the maternal organs do not *totally* heal for about six weeks (the "puerperium"),[11] most women whose jobs are not overly strenuous can probably return to work within three weeks after delivery without threatening their health.[12]

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[8] First and second degree lacerations of the perineum are extremely common during delivery, especially in primagravidas. The usual laceration is a jagged tear, which must be surgically repaired (*i.e.*, with "stitches"). For this reason, most physicians prefer to perform an episiotomy, which is a surgical procedure. "[I]t substitutes a straight, clean surgical incision for the ragged laceration that otherwise frequently results, and such an incision is easier to repair and heals better than a tear." WILLIAMS at 433.

[9] Total blood loss during and soon after the vaginal delivery of a single fetus is about 500 ml.; vaginal delivery of twins involves a loss of about 900 ml.; and delivery by cesarean section involves even greater loss of blood. WILLIAMS at 238-39. See Pritchard, *Changes in Circulation and Blood Volume During Pregnancy and Delivery*, ANESTHESIOLOGY 26: 393 (1965).

[10] 1 DAVIS, GYNECOLOGY AND OBSTETRICS 7 (rev. ed. 1972).

[11] WILLIAMS at 476.

[12] Affidavit of Dr. Calderwood, Appendix at p. 37.

What must be kept in mind is that we are concerned here only with the period in each case when a woman is medically certified as unable to work.[13]

II.

A state disability program which denies compensation for pregnancy-related disabilities is not rationally related to any legitimate state purpose and invidiously discriminates on the basis of sex in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution.

Whether this Court applies the "rational basis" test or the "strict scrutiny" test, it must conclude that the California statute is violative of the Equal Protection Clause.

Programs to provide compensation for wage losses during periods of disability have developed as a result of broad social welfare policies of the state and federal governments and the recognition that existing programs, i.e., unemployment, workmen's compensation and paid "sick leave" programs, do not adequately cover wages lost because of disability unrelated to employment.

The notion underlying unemployment compensation is, of course, that the worker is able to work and is available for employment which the job market is unable to supply.[14]

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[13] Although the State often refers to the disability compensation involved in this case as "maternity benefits" (Brief for Appellant at 3, 6, 7, 9, 15, 23, 35, 36), that is a misnomer. The term "maternity benefits" is commonly used to refer to *special* benefits conferred by the state or the employer regardless of the woman's physical condition, *in addition* to compensation for any loss of income due to disability. Thus, the question of maternity benefits is entirely different from the issue in this case and must be decided on the basis of social policy rather than medical considerations.

[14] *See, e.g.*, U.I.C. §§1251-1537.

The benefits are, by definition, unavailable to the disabled worker.[15] And while most states have therefore instituted workmen's compensation programs to reimburse the employee for part of the wages lost due to employment-related disabilities,[16] disabilities arising out of pregnancy are not covered by such programs either, since they are not employment-related. Many employers also permit employees to take a small number of paid "sick days" per year, in recognition of the fact that even relatively healthy people occasionally are unable to work for short periods of time from such conditions as headaches, upper respiratory tract infections, strained muscles, etc. While pregnancy-related disabilities should, of course, be covered by such programs,[17] the length of disability may exceed the number of "sick days" allowed.

Thus, some states and private employers have instituted or are instituting disability compensation programs such as the California program involved here which partially compensate a worker for loss of wages when he or she is unable to perform his or her regular or customary work because of physical or mental conditions unrelated to employment. Disabilities arising out of normal pregnancy and childbirth are precisely of the sort intended to be covered by this type of program. In the words of the court below, "the state has attempted [through the California Unemployment Insurance Code] to reduce to a minimum the

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[15] Many states, however, deny unemployment compensation to pregnant women *regardless* of ability to work. See Auchincloss, *Unemployment Benefits*, 1 WOMEN'S RIGHTS LAW REPORTER 38 (No. 4, Spring 1973).

[16] *See, e.g.*, CALIF. LABOR CODE §§3201 *et seq.*

[17] Employers have sometimes refused to treat pregnancy-related illness as other illnesses, for the purpose of "sick-days." *See, e.g., Bravo* v. *Board of Educ.*, 345 F. Supp. 155 (N.D. Ill. 1972). *See also* HAYDEN, PUNISHING PREGNANCY 37-41 (ACLU Report, Oct. 1973).

suffering caused by involuntary unemployment of every type." 359 F. Supp. at 794.

Only the Rhode Island,[18] Hawaii,[19] New Jersey,[20] and California programs, however, do not totally exclude all pregnancy-related disabilities from coverage. Rhode Island's program amounts to a program of maternity benefits.[21] Hawaii's program comes closest to a true disability program, since pregnancy is covered only when it causes disability. New Jersey's program creates a presumption that a woman is "sick" four weeks prior to and four weeks subsequent to delivery. California's newly-amended statute covers only disabilities resulting from "abnormal and involuntary complication[s]" of pregnancy, thus excluding, among others, disabilities arising out of normal pregnancy and childbirth.

In urging that pregnancy-related disabilities should, nonetheless, be excluded from the program, the State argues that pregnancy-related disabilities are significantly different from other disabilities because "[p]regnancy is, to a much greater extent than any illness or injury, voluntary and subject to planning." Brief for Appellant at 19.[22] To the extent that it is "voluntary," both a man and a woman are "voluntarily" involved in causing the pregnancy. Yet only the woman suffers financially because

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[18] R. I. GEN. LAWS ANN. §28-41-8 (1962).

[19] HAWAII REV. STAT. §392-27 (1968).

[20] N.J. STAT. ANN. §43:21-29 (1962).

[21] Thus, appellant's discussion of the Rhode Island program is inapposite. Brief for Appellant at 11, 32.

[22] To support this proposition appellant cites *Roe* v. *Wade*, 410 U.S. 113 (1973). We fail to find in that decision any language to support appellant's statement.

of her involvement.[22] In this regard, the State's argument has definite moral overtones which have no place here. Venereal disease is also a result of "voluntary" acts of sexual intercourse, but disabilities caused by V.D. would be covered by the California program. Other "voluntary" disabilities, such as those resulting from attempted suicide, cosmetic plastic surgery, dipsomania, drug addiction, obesity, and sex change operations are covered by the program, as has been pointed out by counsel for appellees and by the court below. 359 F. Supp. at 800.

Additionally, pregnancy is not always voluntary. Physicians treat many patients who have become pregnant involuntarily. Contraceptives, even "the pill," are not always effective, and for medical reasons many women cannot use the more effective types of contraceptives. To tell a woman who has become pregnant accidentally and is trying to decide between abortion and giving birth that disabilities related to both of her alternatives are not covered because pregnancy is "voluntary" is not only irrational but cruel.

Further, we disagree with appellant's assumption that "[e]ven where pregnancy is unexpected, the period of actual inability to work can be anticipated months in advance, and the attendant expenses calculated and met in other ways." Brief for Appellant at 19 n.23. The record in this case, as well as common experience, belies that assumption. For the many women who live on a bare subsistence level, loss of wages can be catastrophic. And even a middle-income worker may not be able to save enough to cover a period of wage loss if she is the sole

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[22] Only the woman is *directly* affected financially. Her family may suffer indirectly by the loss of her wages, as in the cases of three of the four named plaintiffs here.

support of her family. See, *e.g.*, "Declaration of Jacqueline Jaramillo," Appendix pp. 21-22.

Finally, if pregnancy is voluntary, it is fortunate that women "volunteer." To borrow a phrase from appellant's brief (at p. 19), "Pregnancy is a normal biological function *necessary for survival of the species.*" (emphasis added). Thus, denying disability benefits for pregnancy-related disabilities makes as much sense as denying disability benefits for injuries suffered while in the armed services of the Nation.

We will leave the sex discrimination arguments primarily to the Appellees. We must, however, note that no one could deny that a statute invidiously discriminated on the basis of race if it provided compensation for all disabilities except those arising out of sickle-cell anemia. That condition affects only Negroes and persons stemming from certain Mediterranean areas. Likewise, no one could deny that a statute invidiously discriminated on the basis of sex if it provided compensation for all disabilities except those arising out of hemophilia, a disease which is disabling only to males (although females can be "carriers"). Similarly, no one can deny that a statute invidiously discriminates on the basis of sex when it grants compensation for all disabilities except those arising out of pregnancy. No authorities need be cited for the proposition that that condition affects only women.

III.

To deny compensation for pregnancy-related disabilities contributes to poor maternal and infant health.

The Physicians Forum is particularly concerned with the practical effect of California's policies on the health of the woman and the child, both before and after birth. Most women who work do so because of financial necessity. Many are heads of households. Others must work because their husband's incomes are insufficient to maintain their families above poverty level. What happens when a woman such as this becomes pregnant?[24]

To begin with, the health risks attendant to pregnancy and childbirth are higher for women and children from low-income families than for those from more affluent families. The woman's general health tends to be poorer, due to nutritional deficiencies and other factors; she makes fewer pre-natal visits to a doctor or a clinic; the hospital in which she delivers her child and the medical care she and the child receive tend to be of generally lower quality.[25]

In a high-risk situation like this, the dangers may increase further if the woman knows she will receive no compensation for any time she cannot work because of pregnancy-related disabilities. She may ignore important warning signs that complications are developing. She may work at a strenuous job well past the time when it is safe for her to do so. After childbirth, she may go back

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[24] We will assume that she has chosen to continue the pregnancy to term.

[25] *See generally, A Study of Risks, Medical Care and Infant Mortality*, 63 Am. J. Pub. Health (Sept. 1973 Suppl.)

to work before it is medically advisable. Injuries to her health and to the health of her child may follow.

In short, a statutory provision such as that involved here may force a woman to work out of economic necessity even though her doctor advises her of the medical risks involved.

IV.

There is no evidence that the program would be abused if pregnancy-related claims were allowed; in any event, any possible abuse could be curbed by applying the same standards to pregnancy-related claims as to other claims.

The State has tried to paint frightening pictures of women conspiring with their doctors to collect benefits under the disability program when they are not truly disabled (see, in the court below, 359 F. Supp. at 806, and before this Court, Brief for Appellant at 20).

The State admits that disabilities arising out of pregnancy and childbirth (or at least the latter) are medically certifiable, in that "it is possible to distinguish between maternity leave and the shorter period of time a female employee is actually unable to work because of childbirth. ..." Brief for Appellant at 20.

Yet, according to the State, claims have averaged fifteen weeks. *Id.* We are not told whether these claims are for disabilities arising only out of normal pregnancy and childbirth. At any rate, we do not understand it to be the usual procedure automatically to pay the amount claimed. As appellees have noted (Motion to Affirm at 4 n.3):

> "Various statutory and administrative rules ensure that only those who are truly incapacitated from per-

forming their regular work receive benefits. Claims must be accompanied by a doctor's affidavit attesting to the existence of the disability. Unemp. Ins. Code §§2627(d), 2708-2710. The individual must submit to such examinations as may be required by the appellant. Unemp. Ins. Code §2627(c). Appellant also maintains 'yardstick' standards measuring the likely time duration of various types of disabilities, and may further investigate claims of unusual duration. In the absence of hospitalization, benefits are not paid until the eighth day of disability."

These same rules which are adequate to test all other types of disabilities will be adequate to test pregnancy-related disabilities as well, once the system becomes accustomed to handling these claims and once the public has been informed of the limits of the program. Many individuals, including physicians, may be acting under the misimpression that California has instituted a program of "maternity benefits." After all, the State itself has so mislabeled it. Once it has been explained to claimants and physicians that payments may be forthcoming only for days when a woman is actually disabled from working, claims will reach a reasonable level. Once the State develops a "yardstick" standard for disabilities related to pregnancy and childbirth, as it has for all other disabilities,[24] it will be able more efficiently to process those claims.

The State also fears that "maternity leaves will be requested based on concern for the welfare of the child...." Brief for Appellant at 20. As we have already noted, how-

[24] We do not agree that it will be difficult to develop a "yardstick" standard for disabilities related to pregnancy and childbirth. See Brief for Appellant at 32. Just because a "yardstick" does not now exist does not mean one cannot be developed.

ever,[17] what is at issue here is not "maternity leaves" but disability compensation. Additionally, the State has failed to distinguish between the pre-partum period, when the fetus is biologically dependent on the woman, and the post-partum period, when the child may be tended by any caretaker, not necessarily the mother. There will undoubtedly be isolated cases where concern for the health of the fetus will necessitate a cessation of the woman's employment prior to the expected delivery date.[18] We cannot believe that the State would raise any serious objections to this. However, after birth, when the mother and child are separate beings, the medical question of a mother's ability to work is totally separate from the question of who will take care of the child. It is not within the physician's sphere to certify that a woman is *medically* disabled from working when her reason for not working is that she wishes to stay home to care for the child, that she wishes to breast-feed the child, or that she is unable to engage someone to care for the child while she is at work, whether for financial or other reasons.[19] Finding solutions to these problems is up to the individual, the state legislatures and Congress.

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[17] See note 13, *supra*.

[18] The State cites only one example of such a case. Brief for Appellant at 20 n.25.

[19] Therefore, the State's citations to the work by S. Cherry and to the affidavit of Dr. Goldstein are inapposite. Brief for Appellant at 20 n.25.

CONCLUSION

For the foregoing reasons the judgment below should be affirmed.

Respectfully submitted,

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Consolidated Cases on Appeal from the United States District Court for the Northern District of California

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF THE APPELLEES ON BEHALF OF WOMEN'S EQUITY ACTION LEAGUE EDUCATIONAL AND LEGAL DEFENSE FUND AND HUMAN RIGHTS FOR WOMEN, INC.

The Women's Equity Action League Educational and Legal Defense Fund (hereinafter "WEAL Fund") and Human Rights for Women, Inc. (hereinafter "HRW") hereby respectfully move, pursuant to Rule 42 of the

Rules of this Court, for leave to file the attached brief as Amici Curiae in support of Appellees in this case. The consent of both the Appellant and the Appellees has been obtained and filed with the Clerk of this Court.

WEAL Fund is a non-profit, tax-exempt corporation organized to provide legal assistance and services to ensure the full recognition and participation of individuals in all facets of American life without discrimination based on sex. HRW is a non-profit, tax-exempt organization whose purposes are to provide volunteer legal assistance in litigation involving rights of women under the law, to undertake research on issues relevant to discrimination against women, and to provide for educational projects on conditions concerning women.

Both groups have participated as Amici Curiae in *Gilbert* v. *General Electric Co.*, No. 142-72-R (E.D. Va., filed March 15, 1972), a pending case which addresses many of the same issues raised by the case at bar.[1] *Gilbert* v. *General Electric Co.* concerns the sickness and accident insurance plan provided by General Electric to its employees as a fringe benefit of employment. It is similar to the original California State disability insurance plan at issue in that all disabilities are covered except those related to pregnancy. Many of the arguments and much of the evidence considered in the *Gilbert* case, therefore, is also relevant to the case now before this Court.

In particular, substantial medical evidence was introduced in the *Gilbert* case comparing the excluded pregnancy-related disabilities with the disabilities which were

[1] Women's Equity Action League (hereinafter "WEAL"), rather than the WEAL Fund, was an Amicus in the *Gilbert* case. The WEAL Fund was established by WEAL in order to assume the function of providing legal services to further the common goal of both groups—the elimination of sex discrimination. However, the WEAL Fund did not actively commence its activities until after WEAL participation in the *Gilbert* case was begun.

insured by the company. In the attached brief, Amici will discuss this medical evidence and demonstrate that it supports the position of Appellees that no valid distinctions can be drawn between the disabilities insured by the California State insurance plan and the pregnancy-related disabilities which are excluded.

CONCLUSION

For the foregoing reasons, Amici request that the Motion to File Brief As Amici Curiae in Support of the Appellees should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-640

DWIGHT GEDULDIG,

Appellant,

v.

CAROLYN AIELLO, individually and on behalf of others similarly situated,

Appellees.

DWIGHT GEDULDIG,

Appellant,

v.

AUGUSTINA D. ARMENDARIZ, ELIZABETH JOHNSON, JACQUELINE JARAMILLO, individually and on behalf of all other women similarly situated,

Appellees.

Consolidated Cases on Appeal from the United States District Court for the Northern District of California

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BRIEF AS AMICI CURIAE IN SUPPORT OF APPELLEES ON BEHALF OF WOMEN'S EQUITY ACTION LEAGUE EDUCATIONAL AND LEGAL DEFENSE FUND AND HUMAN RIGHTS FOR WOMEN, INC.

STATEMENT OF INTEREST OF AMICI CURIAE

The interest of Amici Curiae is fully described in the Motion for Leave to File Brief As Amici Curiae above.

INTRODUCTION AND SUMMARY OF ARGUMENT

The issue in this case is whether the State of California can constitutionally exclude disabilities related to "normal pregnancies" from coverage under its disability insurance program.[2] California has stated that its objective in excluding such benefits is to limit the costs of the program.[3] Certainly cost control is a valid legislative objective. However, it cannot be achieved in a manner which violates the equal protection guarantees of the fourteenth amendment.[4] At the least, the State must have a rational basis for selecting its particular method of furthering economy.[5] The State, for example, could not control the costs of its program by excluding from coverage all persons with blue eyes. Nor could it control the costs by arbitrarily excluding from coverage a particular type of injury—such as broken legs. Amici contend that the State of California is similarly precluded from achieving

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[2] Initially the State excluded all pregnancy-related disabilities from coverage under the Act. As a result of a state court's interpretation of the original statute, California Unemployment Insurance Code, Section 2626 (Stats. 1953, c.308 p.1531) in *Rentzer* v. *California Unemployment Ins. Appeals Bd.*, 32 Cal. App. 3d 604 (1973), and the amendment to the statute effective January 1, 1974, only disabilities that do not arise from "an abnormal and involuntary complication of pregnancy" are excluded from coverage. The State apparently takes the position that under the new law only disabilities arising from "normal" pregnancies are excluded from coverage. *See* Appellant's Brief at 3-4.

[3] *See* Appellant's Brief at 13-15, where the four reasons for excluding benefits are listed, and the State explains that the first three are designed to further "fiscal objectives," while the fourth reflects a legislative policy decision based in part on Rhode Island's experience of the costs of coverage.

[4] *See Shapiro* v. *Thompson*, 394 U.S. 618, 633 (1969); *Memorial Hospital, et al.* v. *Maricopal County, et al.*, 42 U.S.L.W. 4277, 4281 (Feb. 26, 1974).

[5] Amici will not address the issue of the proper standard of review to be applied in this case, for this issue is fully covered in other briefs.

cost control by excluding disabilities arising from normal pregnancies.

California attempts to justify its decision to exclude coverage for disabilities related to "normal pregnancies" as a method of cost control "[b]ecause pregnancy-related absences are not physiologically comparable to illness or injury . . . ."[6] In this brief, Amici will focus on the question of whether, as a "physiological" or medical matter, disabilities caused by normal pregnancies can be distinguished from the other disabilities covered by the California program.

California contends that the pregnancy-related disabilities are unlike the other disabling conditions which are insured because they are normal, voluntary, subject to planning, and because there is disagreement as to the criteria for determining the period of disability. Amici will demonstrate that, in fact, these characteristics cannot all be applied to disabilities related to the normal pregnancy, nor do they serve to distinguish such disabilities from other disabling conditions insured by the California program.

ARGUMENT

I. Disabilities Related to Pregnancy Cannot Be Distinguished From Other Conditions Included in the California Plan on the Grounds That They Are Not Illnesses or Injuries.

A basic issue in this case is whether pregnancy-related *disabilities* are, as a physiological matter, any less illnesses or injuries than the other disabilities covered by the California disability insurance plan. Appellant's emphasis on the fact that pregnancy per se may be considered a normal condition and not an illness or injury

[6] Appellant's Brief at 14.

is irrelevant.[7] Appellees do not claim that women should be entitled to benefits under the California plan simply because they are pregnant, but only that they be covered if their pregnancy results in disability requiring a work absence. By failing to focus on the nature of the *disabilities* associated with pregnancy, Appellant has failed to confront this basic issue.

A. *Neither the Lay Terms "Illness" and "Injury" Nor the Medical Term "Disease" Exclude Disabilities Arising From Pregnancy.*

The California Unemployment Insurance Code provides for a program which insures California workers against disabilities requiring absences from work. Section 2626 defines disabilities to include "both mental or physical illness, [and] mental or physical injury . . . ," but, with regard to pregnancy-related disabilities, section 2626.2 states that only such disabilities caused by "an abnormal and involuntary complication of pregnancy . . ." are included.[8] The State argues that pregnancy-related disabilities were excluded from coverage because pregnancy is "neither illness nor injury . . . ."[9] However, when the terms "illness" or "injury" are examined, it becomes clear that the disabilities caused by pregnancy are as much illnesses or injuries as other disabilities covered by the plan.

The statutory words "illness" and "injury" are not in fact medical terms. Instead, they are used by laymen, and refer to general, subjective conditions whose common thread is disability. Dr. Andre Hellegers, an expert witness for plaintiffs at trial in *Gilbert* v. *General Electric*

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[7] *See* Appellant's Brief at 17-19.

[8] California Unemployment Insurance Code §§ 2626, 2626.2 (Stats. 1953, c.308 p.1531, as amended, January 1, 1974).

[9] Appellant's Brief at 17.

Co., No. 142-72-R (E.D. Va., filed March 15, 1972), has explained that terms such as "illness" or "sickness" are terms used by laymen to describe the way they feel, rather than terms which denote discrete medical conditions.[10] Similarly, Dr. George Wilbanks, an expert witness at trial for defendants in the *Gilbert* case, stated that lay persons use the terms "illness" or "sickness" to mean a "poor feeling," while " 'disease' as used by the medical person, would be critically defined as a definite condition." [11]

There can be no question that during the period of disability associated with the most normal of pregnancies—labor, delivery (parturition) and at least the early stages of recovery (puerperium)—women suffer discomfort, pain, and would be considered as feeling "poorly" or ill.[12] Appellant has agreed that during this period, women

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[10] Dr. Andre Hellegers' discussion of the term "illness" is found at *Gilbert* v. *General Electric Co.*, *supra*, Transcript of Trial, July 24-26, 1973 (hereinafter "*Gilbert* Transcript"), at 243. An affidavit of Dr. Hellegers, describing his expertise, has been submitted by Appellant in this case in its Appendix at 43.

[11] *See Gilbert* Transcript at 577. There are a variety of acceptable medical definitions of the technical term "disease." It has been defined most often as "a condition which, if not corrected, could lead to further debility and untimely death;" but also to be an "inability to function;" "a statistical deviation from the average;" or "an abnormal state which is deleterious to the patient." The World Health Organization has defined the term as "the absence of a sense of total physical, psychological, or social well-being." Testimony of Dr. Andre Hellegers, *Gilbert* Transcript at 242-243. According to DORLAND, 24th ILLUSTRATED MEDICAL DICTIONARY (24th ed. 1965) 428, a disease is "a definite morbid process having a characteristic train of symptoms. It may affect the whole body or any of its parts, and its ideology, pathology, and prognosis may be known or unknown."

[12] *See* WILLIAMS, OBSTETRICS (1966), 397, 399, which discusses the pain involved in labor and childbirth. The average duration of labor for a woman delivering her first baby is twelve hours, and the average duration for later deliveries is eight hours. Moreover, drugs

are physically unable to work.[13] Certainly, then, pregnancy-related disabilities must fall within the meaning of the lay term "illness." The California legislature apparently recognized this fact, and therefore expressly excluded disabilities related to normal pregnancy from coverage under the Act.

Moreover, the disabilities associated with normal pregnancies even fit within the most common definition of the more technical term "disease"—a condition which, if not corrected, could lead to further debility.[14] During birth, the vaginal tissues will most likely rip; and if the opening is not properly repaired, Dr. Hellegers has stated that a woman would have a diseased condition, causing her discomfort for the rest of her life. Therefore, virtually every birth in the United States involves the surgical procedure of an episiotomy, a cutting of the tissue between the posterior opening of the vagina and the rectum to provide an opening large enough for the baby's head to pass through.[15] The operation is performed because an incision is easier to repair than a tear. The repair is done with absorbable sutures, usually under

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and narcotics are often prescribed for pains occurring after childbirth. *Id.*, at 482.

Dr. David Forrest, an obstetrician and gynecologist, who was an expert witness for plaintiffs at trial in *Gilbert* v. *General Electric Co.*, *supra*, testified that from the evidence of the need for an anesthetic, at least for the episiotomy which is performed in virtually every case, all women suffer discomfort during labor and delivery. *See Gilbert* Transcript at 89. *See also* testimony of Dr. Wilbanks, *Gilbert* Transcript at 586; testimony of Dr. Hellegers, *Gilbert* Transcript at 332.

[13] Appellant's Brief at 20.

[14] *See* note 11, *supra*.

[15] The procedure can only be performed by a licensed doctor or nurse midwife. Testimony of Dr. Hellegers, *Gilbert* Transcript at 331.

anesthesia, and the sutures and anesthesia are the same kinds that are used in other surgical procedures.[16]

Moreover, the usual practice in the United States is to hospitalize women during labor and delivery because medical presence during this period is necessary to ensure that the process is completed without other emergency complications arising. During birth, in addition to performing the episiotomy, the physician guides the infant's head, and, if necessary, prevents the baby from emerging too quickly.[17]

Similarly, after the birth, hospitalization is continued at least for a short period of time. The condition of the birth passages in the early days of puerperium has been compared to an open wound, with the attendant dangers of infection.[18] Dilation and partial dysfunction of the renal pelvis and uretic and urinary bladder occur which foster the development of urinary tract infections.[19]

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[16] *See* testimony of Dr. Hellegers in *Gilbert* Transcript at 330-332.

[17] *See* testimony of Dr. Hellegers in *Gilbert* Transcript at 330. These functions certainly go beyond hand-holding and rubbing backs, which were highlighted by Appellant as Dr. Hellegers' testimony in its Brief at 31, fn.48.

[18] In BECK, OBSTETRICAL PRACTICE (6th ed. 1955), 388, it is stated: "Following labor, the birth passages are the seat of lacerations, which serve as possible portals of entrance for virulent bacteria. In addition, the relaxed condition of the vagina and pelvic floor leaves the introitus [external opening] more patulous [exposed] than normal. For these reasons, the vulva should be regarded as an open wound during the early days of the puerperium, and every precaution should be taken to protect against its infection."

[19] TENNY & LITTLE, CLINICAL OBSTETRICS (1961), 398. *See also* WILLIAMS, *supra* at 479, and VORHERR, *Puerperium, Maternal Involutional Changes and Lactation*, in GYYNECOLOGY AND OBSTETRICS, rev. ed., vol. 1, chap. 20 (Davis, ed. 1972), 11, which states:

"The urinary bladder also frequently is traumatized during delivery, whereupon it becomes edematoric and hyperemic."

In addition, leukocytosis (an increase in white blood cells) appears at this stage.[20] Again, just as when other conditions are accompanied by similar symptoms and risks, medical attendance is required in the case of disabilities related to pregnancy.

In short, even the common technical definition of "disease," which focuses on a condition which requires treatment if further debility is to be avoided,[21] surely encompasses the condition of a woman during the period she is disabled during pregnancy.

B. *The Disabilities Which Are Covered by the California Plan Indicate That the Terms "Illness" and "Injury" Include Physiological Conditions That Cannot Be Distinguished From Pregnancy-Related Disabilities.*

Because every disability necessitating absence from work is covered under the California plan except those arising from a normal pregnancy, many disabilities are insured which are not uniformly defined as "diseases." For example, disabilities caused by elective surgery, alcoholism, obesity and migraine headaches are insured by the California plan. All of these conditions, therefore, fit within the meaning of the term "illness" as used in the statute, yet none are considered to fall within every traditional medical definition of the term "disease." [22]

Hence, it is only with regard to disabilities related to pregnancy that undefined notions of "normal processes" and "physiological" distinctions are cited as justification for exclusion. When other disabilities are at issue, the only relevant question is whether absence from work

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[20] *See* BECK, at 387; and WILLIAMS, at 484, who also describes the occurrence of lymphopenia and eosinopenia.

[21] *See* note 11, *supra*.

[22] *See* DORLAND, ILLUSTRATED MEDICAL DICTIONARY, *supra*, which excludes all of these conditions from the definition of the term "disease."

is medically necessary. Physiological distinctions between cosmetic surgery to alter physical appearance and conditions arising from cancer or heart ailments are deemed to be irrelevant. Similarly, such distinctions must be irrelevant to the issue of whether pregnancy-related disabilities are to be covered under the California plan.

C. *The Fact That Disabilities Related to Pregnancy Are Statistically Common Does Not Justify Their Exclusion From Coverage Under the California Plan.*

Appellant characterizes pregnancy as "statistically normal" and, by implication, similarly characterizes the disabilities related to normal pregnancies.[23] However, statistical frequency has played no part in excluding any other type of disability from coverage under the California plan.

For example, disabilities arising from the common cold are covered, despite the fact that virtually every worker will be disabled by a cold during his or her working career. Similarly, influenza epidemics recur almost annually, and affect vast sections of the population. Yet again, such disabilities are insured without question so long as absence from work is required. Therefore, it is only when pregnancy-related disabilities are at issue that infrequency of occurrence becomes a prerequisite to coverage.

II. Pregnancy-Related Disabilities Are No More Voluntary Than Other Conditions Covered by the State's Plan.

Appellant stresses that pregnancy is voluntary and justifies the exclusion of pregnancy-related disabilities from coverage under the California plan on this ground.[24]

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[23] Appellant's Brief at 18.

[24] Appellant's Brief at 19.

But it is a matter of common sense that once the focus is placed where it belongs—on pregnancy-related disabilities rather than pregnancy per se—Appellant's argument has little value. Even in cases where pregnancy is desired, one could hardly contend that disabilities associated with pregnancy are also desired. The disabilities, like income taxes, may be inevitable, but they are not voluntary.

Significantly, the California plan covers elective procedures, including cosmetic surgery, where the employee has voluntarily chosen to undergo the operation. In these cases, as in pregnancy, some period of disability is inevitable. Yet the State does not contend that these disabilities are voluntary and therefore excludable from coverage.

Moreover, there are many instances where the pregnancies themselves are not desired. As abortion and adoption statistics attest, many women become pregnant involuntarily with no intention of carrying to term or of taking on the responsibilities of parenthood. Unwanted pregnancies and unwanted children are not a thing of the past.[25] Even the most effective contraceptive methods are far from fail safe,[26] and, in addition, many women cannot use them because of medical or religious reasons.

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[25] A study by Bumpass and Westoff indicates that from 750,000 to more than 1,000,000 births annually in the United States are unwanted. *The "Perfect Contraceptive" Population.* 169 SCIENCE, 1177 (1970).

[26] "All of the (contraceptive) methods used today are imperfect in some glaring way . . . The results show that in an average year use failure rates were as follows: pill, 4 percent; IUD, 7 percent, condom, 16 percent; diaphragm, 18 percent, withdrawal, 21 percent; rhythm, 28 percent; foam, 29 percent." L.A. WESTOFF & C.F. WESTOFF, FROM NOW TO ZERO; FERTILITY CONTRACEPTION AND ABORTION IN AMERICA (1971), 68-69, 293-294.

The birth control pill is the most effective contraceptive method presently available.[27] But its safe use over long periods has not been established, and it has adverse effects on many women.[28] Other methods of contraception are also limited either by their effectiveness or because they are medically contraindicated for certain kinds of women.[29]

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[27] *See* note 26, *supra*.

[28] One article on contraceptive technology made the following comment on oral contraceptives after noting the increased risks of thromboembolic disease in women taking the Pill:

> "Other side effects which are less well understood relate to biochemical or metabolic abnormalities observed with varying frequency in pill users. About 50 have been described thus far, and it is possible that the hormones contained in the pill produce biochemical, structural or functional alterations in every organ and tissue . . . the contraceptive effect of the pill results from interference with the extremely delicate and complex hormonal mechanisms which control the menstrual cycle, ovulation and the reproductive process. This elaborate control system is thrown out of balance, and contraception is achieved by means which can be compared to using a sledgehammer to kill a mosquito." OSCAR HARKAVY & JOHN MAIER, *Research in Reproductive Biology and Contraceptive Technology: Present Status and Needs for the Future*, FAMILY PLANNING PERSPECTIVES, vol. 2, No. 3 (June 1970), 6.

Moreover, women with high blood pressure or a family history of phlebitis are warned not to take birth control pills. *See* WESTOFF & WESTOFF, FROM NOW TO ZERO; FERTILITY CONTRACEPTION AND ABORTION IN AMERICA, *supra*, at 92-100.

Dr. Hellegers testified in *Gilbert* v. *General Electric Co.*, *supra*, that half the women who use the pill stop taking it within three years because they can no longer tolerate the side effects. *Gilbert* Transcript at 316.

[29] The effectiveness of other methods is described in note 26 *supra*. Many doctors will not insert an IUD for a woman who has never had a child or a miscarriage, or one who has undergone a previous Caesarian section. Testimony of Dr. Hellegers, *Gilbert* Transcript at 274-275; testimony of Dr. Forrest, *Gilbert* Transcript at 52. The 20 percent expulsion rate was cited as an index of the numbers of women for whom this contraceptive method is inappropriate. Testimony of Dr. Hellegers, *Gilbert* Transcript at 275.

In addition, for many women any means of contraception other than the rhythm method creates a religious dilemma. Yet this technique is considerably less effective than other available methods,[20] and, in fact, is of little use to women with irregular menstrual cycles.

Abortion remains a last resort for women whose contraceptive methods have not been effective. But there are occasions when abortions would be medically contraindicated,[21] and, as a practical matter, in certain areas of the country abortions are not available.[22] Most important, abortion is unacceptable to millions of women on moral or religious grounds, including many women who find the most effective methods of contraception unacceptable.

Finally, the fact that sexual intercourse may be voluntary, although the resulting pregnancy is unwanted, cannot serve to justify the exclusion of pregnancy-related benefits from coverage.[23] The California plan provides benefits for many disabilities which arise from voluntary activities. Disabilities caused by suicide attempts, excessive smoking, excessive drinking, and dangerous sports activities are all covered. In many of these instances, individuals recognize that their activities are likely to

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[20] *See* note 26, *supra*.

[21] Dr. Hellegers has stated that abortion is medically contraindicated for many individuals with psychiatric problems, and that there is an increased incidence of premature delivery in subsequent pregnancies if the first pregnancy is aborted. *Gilbert* Transcript at 276-277.

[22] Roman Catholic hospitals in the United States (one-third of all private hospitals) will not perform abortions on their premises. A high percentage of Baptist hospitals similarly refuse to allow abortions to be performed in their facilities. Testimony of Dr. Hellegers, *Gilbert* Transcript at 277-278.

[23] Obviously in the case of rape, the sexual intercourse itself is not voluntary. However, the California plan does not provide coverage even under those circumstances.

result in disabling injuries and knowingly accept the risks involved. Yet the State has not claimed that these disabilities are voluntary and thus excluded from coverage.

III. Pregnancy-Related Disabilities Are No More Subject to Planning Than Other Conditions Covered by the California Plan.

Appellant also stresses "that pregnancy is, to a much greater extent than any illness or injury, . . . subject to planning." Appellant suggests that women may therefore go to work for one year solely to collect disability payments after childbirth.[34]

In fact, there are many disabilities covered under the California plan which allow for greater planning than do disabilities related to pregnancy. Elective surgery—e.g., the removal of benign tumors or cosmetic surgery—is, of course, totally subject to planning. Not only is it possible to decide whether to undergo the surgery, but the exact timing of the disabling period can be chosen. Similarly, many non-elective operations are subject to planning, for the timing of the procedure can be quite flexible. Hysterectomies, tonsillectomies, adenoidectomies, and gall bladder operations are among the procedures which can often be scheduled to suit the patient's convenience. It is the fortunate woman, on the other hand, who can succeed in giving birth according to plan precisely one year after she has become employed.

[34] Appellant's Brief at 19-20.

IV. Medical Disagreement Regarding the Duration and Severity of Pregnancy-Related Disabilities Is No Greater Than the Disagreement Regarding Other Disabilities Covered by the California Plan.

A. *Physicians Disagree as to the Duration and Severity of Many Disabilities Included in the California Plan.*

Appellant contends that "doctors disagree sharply on the duration and severity of pregnancy disability" and that this disagreement justifies the exclusion of pregnancy-related disabilities.[35] However, even if some disagreement does exist, doctors also disagree on the duration and severity of many other disabilities which are covered by the California plan. There are, for example, wide differences of opinion on how promptly heart attack victims should return to work. Numerous academic studies criticize the practicing physician for discouraging heart attack victims from returning to the work force promptly.[36] Similarly, the California plan covers mental illness, yet it is well-established that physicians differ sharply

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[35] Appellant's Brief at 32.

[36] Kaufman and Becker cite "the untrained, unenlightened physician" as a "major" cause of employment disability. *Rehabilitation of the Patient With Myocardial Infarction*, GERIATRICS (August 1955), 355-358. Another study found that:

> "over half of those unemployed need not be out of work. Following myocardial infarction much of the disability experienced by these patients is functional rather than organic and due to the inappropriate medical advice. Misinterpretation of symptoms by the patient and his doctor is a frequent basis for unnecessary inactivity and subsequent failure to return to work." WIGLE, SYMINGTON, LEWIS, CONNELL & PARKER, *Return to Work After Myocardial Infarction*, CANADIAN MEDICAL ASSOCIATION JOURNAL (Feb. 6, 1971), 210, 212.

Nagle, Ganzola and Picton-Robinson in *Factors Influencing Return to Work After Myocardial Infarction*, THE LANCET (Aug. 28, 1971), 454-456, conclude that "essentially the problem seems to be one of education of hospital staff, general practitioners, employers, relatives and the patients themselves."

as to what constitutes mental illness and as to the proper method of treating such illness, including the period of time the patient remains disabled.[37]

Appellant also implies that the disagreements as to the duration of pregnancy-related disabilities are unique because they stem in part from socio-economic considerations such as the relationship between the mother and the new-born infant. However, disagreements as to the duration of other disabilities may stem from socio-economic considerations as well.

For example, in the case of heart attacks, some physicians suggest that given the poor employment prospects of older persons and improved retirement benefits, older heart attack victims should be encouraged to retire rather than try to return to the work force.[38] And, in cases

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[37] *See* Thomas S. Szasz, *The Right to Health*, 57 GEORGETOWN L.J. 734, 743 (1969), who states that in the area of psychiatry there are "unclarified issues concerning what constitutes an illness and treatment . . . ." He points out that in a leading text book there are listed:

> "40 methods of psychotherapy. Among these . . . [are included] physical treatment, medicinal treatment, reassurance, authoritative firmness, hospitalization, ignoring of certain symptoms and attitudes, satisfaction of neurotic needs, and bibliotherapy. In addition, there are physical methods of psychiatric therapy, such as the prescription of sedatives and tranquilizers, the induction of convulsions by drugs or electricity, and brain surgery. Obviously, the term 'psychiatric treatment' covers everything that may be done to a person under medical auspices—and more." *Id.*, at 741 [footnotes omitted].

See also Greenwood v. *United States*, 350 U.S. 366, 375 (1956), where the Court said:

> "[t]he only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment . . . ."

[38] NAUGHTON, BRUHN, LATEGOLA & WHITSELT, *Rehabilitation Following Myocardial Infarction*, AMERICAN JOURNAL OF MEDICINE (May 1969), 725-731. *See also* BIORCK, *The Return to Work of Patients With Myocardial Infarction*, JOURNAL OF CHRONIC DISEASES (1964), 653-57.

involving mental illness, employment prospects and the availability of out-patient care play a crucial role in physicians' determination of the patient's suitability for release from an institution and return to the work force.[39]

Furthermore, the California program now covers disabilities related to "abnormal" pregnancies. Presumably, whatever disagreement there might be among doctors as to the duration of the disability period in these cases is similar to that for the disability period related to a normal pregnancy. In addition, if the complicated pregnancy results in a successful childbirth, broader socio-economic concerns such as infant well-being would be considered in the same way that they would be in the normal pregnancy.

B. *Appellant Has Overstated Physicians' Disagreement As To the Duration and Severity of Pregnancy-Related Disabilities.*

The disagreement among physicians as to the severity and duration of pregnancy-related disabilities is not nearly so great as Appellant would have this Court believe. There is an abundance of evidence which indicates that with respect to normal pregnancy, the medical profession views approximately six weeks as the average period of disability, rather than the fifteen weeks claimed by Appellant.

In the eight affidavits of physicians submitted by Appellant, only one states that in a normal pregnancy the average disabling period would last for fifteen to eighteen weeks.[40] A second physician indicates that following *con-*

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[39] A study of patients at St. Elizabeth's Hospital in Washington, D.C. found that over half of the patients could be released if appropriate out-patient facilities and residences were available. Many of these patients could then return to the work force. NIMH, *Preliminary Findings From the Psychiatric Inventory of St. Elizabeth's Hospital* (May 1970).

[40] Affidavit of Dr. D. Allan Treat, Appellant's Appendix at 31.

servative medical practice, a woman would be advised to stop working in the third trimester of pregnancy, and therefore perhaps he would agree with an average disabling period of fifteen to eighteen weeks.[41] However, of the remaining six physicians, only one described the average disabling period to be as long as six to eight weeks. The remaining five cited periods of between two to six weeks as average.

In addition, Appellant's Appendix A lists the survey responses of some California obstetricians and gynecologists as to the duration of disabilities caused by normal pregnancies. The estimates ranged from no disability to fifteen weeks.[42] Appellant cited this spread of answers as indicating a lack of medical consensus, which would make norms impossible to develop.[43] However, a more reasonable explanation of the wide range of responses, indicating, for example, that there is no period of disability, is that the physicians did not fully understand the questions asked in the survey and were not aware of the appropriate considerations to be taken into account in making the estimate.[44]

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[41] Affidavit of Dr. Walter M. Ballard, M.D., Appellant's Appendix at 33.

[42] The average was approximately seven weeks.

[43] Appellant's Brief at 32.

[44] Similarly, the fact that the disability claims for pregnancy submitted since the lower court opinion in this case have averaged approximately fifteen weeks can be explained by physicians' confusion as to the proper elements which comprise a determination of disability for purposes of the California plan. The affidavit of Betty Kathleen Kidder, a former claims examiner for the Disability Insurance Office in San Francisco, suggests that physicians be given pamphlets describing the physicians' role and duty in certifying pregnancy-related disabilities. Moreover, she has explained that the sample indicating the fifteen week average is small, and therefore possibly unrepresentative of the claims which will be received. Appellant's Appendix at 62-64.

In contrast, the experts testifying both for plaintiffs and defendant in *Gilbert* v. *General Electric Co.* agreed that the maximum disability period is approximately six weeks in a normal pregnancy. These physicians, whose attention was focused on the specific considerations involved in insuring pregnancy-related disabilities, stated that in most jobs a woman could continue to work until labor, and that following delivery she would be able to return to work within six weeks.[45] There is every reason to believe that once other physicians are educated as to the meaning of disability in pregnancy for purposes of the California insurance plan, they too will readily conform their certification of disabilities accordingly and consensus will be obtained.

Moreover, the American College of Obstetricians and Gynecologists has stated that "[i]n an uncomplicated pregnancy, disability occurs near the termination of pregnancy, during labor, delivery and the puerperium. The process of labor and puerperium is disabling in itself. The usual duration of such disability is approximately six to eight weeks." [46]

Dr. Hellegers has explained that physicians are actually in a better position to determine the physical condition of a woman in puerperium than they are with regard to many other physical conditions. The uterus and its contents are easily subject to medical examination, and imitation of disabling conditions of the uterus is extremely difficult.[47]

As noted earlier, the State suggests that non-physiological considerations also can and should be taken into ac-

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[45] *See* testimony of Dr. Hellegers, *Gilbert* Transcript at 245-4, 254-5; of Dr. Wilbanks, *Gilbert* Transcript at 624-5, 589-90; and of Dr. Forrest, *Gilbert* Transcript at 23, 65-67.

[46] American College of Obstetricians and Gynecologists, *Policy Statement on Pregnancy-Related Disabilities*, March 2, 1974.

[47] Testimony of Dr. Hellegers, *Gilbert* Transcript at 314.

count in determining the period of disability for pregnancy-related conditions."[48] If this is the State's decision, and physicians are so apprised, it can be expected that the medical community will develop norms which reflect these considerations as well.

In short, Appellant has failed to support its allegation that physicians' determination of the duration and severity of pregnancy-related disabilities is uniquely different from their determination of the length of other disabilities covered by the California plan. In fact, the approach taken by physicians in treating and determining the disabling period associated with pregnancy is comparable in every respect to the approach taken with regard to other insured disabilities. Once again, Appellant has been unable to find a ground for distinguishing pregnancy-related disabilities as a medical matter from the other disabilities which the California plan insures.

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[48] Appellant's Brief at 32.

CONCLUSION

For the foregoing reasons, as well as for the other reasons set forth in the opinion below, Amici Curiae urge that the judgment below be affirmed.

Respectfully submitted,

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DATED: March 11, 1974

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-640

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CONSOLIDATED CASES ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE APPELLANT.

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE APPELLANT.

INTEREST OF THE AMICUS CURIAE.[1]

The statement of interest has been submitted previously in the Brief Amicus Curiae of the Chamber of Commerce of the United States of America in Support of the Jurisdictional Statement.

1. Consents of all parties to the participation of the amicus in this proceeding have been filed with this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT.

This case presents the issue of whether a state statute may exclude maternity benefits from a state insurance program, which is intended to provide broad coverage at a minimal cost, without violating the Equal Protection Clause of the Fourteenth Amendment. This issue, however, can be viewed more broadly and when so considered this case has national and far reaching significance. Thus, while the constitutional question is significant, even more compelling are closely related questions concerning the Equal Opportunity Commission's new opinion guideline, effective April 5, 1972, on pregnancy and childbirth. This guideline states in part: "(b) . . . benefits . . . shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities." (Section 1604.10 (effective April 5, 1972))

Furthermore, a discussion of the Commission's guidelines is appropriate in this case because of the reflective effect of these guidelines on the Fourteenth Amendment. That is, this Court's decision here may well be influenced by the guidelines; conversely, this Court's decision here may have a significant impact on the determination of related cases arising under Title VII.

Two issues of national importance are occasioned by this guideline:

1. Should this Court give any weight to the Commission's opinion or guideline on pregnancy and childbirth?

2. Should an employer be required to provide fringe benefits for pregnancy or maternity on the same terms as he provides these benefits for illness or injury?

It is apparent that the question of whether an employer covered by Title VII may exclude maternity and related conditions from his insurance program will be a question that will

frequently trouble every employer who provides insurance coverage for his employees, and, in addition, will puzzle lower courts unless this Court provides guidance.

While this Court has rendered decisions in the *LaFleur* and *Cohen*[2] cases, there is a significant difference between those cases and the instant case. *LaFleur* and *Cohen* involved the narrow issue of whether school boards' policies requiring mandatory maternity leave in the fourth or fifth month of pregnancy violated the Fourteenth Amendment. That is, the issue was whether there was a rational basis for an employer to treat all pregnant employees alike without considering an individual's ability to work despite pregnancy. Here, this Court is asked to consider whether an employer may exclude maternity and related conditions from coverage under his employee benefit program without being guilty of sex discrimination simply because the excluded condition occurs only to one sex. To focus more closely on this question, it is apparent that an employer implementing his benefit insurance program may, if he chooses, exclude a condition, such as heart disease, which affects both men and women without violating any law. Does an employer, then, by excluding maternity and related conditions as covered risks under his benefit program thereby violate Title VII whether or not he presents sound reasons to justify the exclusions? The E. E. O. C. says yes. Reason dictates the contrary. This Court has not spoken.

The *amicus* believes that an employer should be able to formulate reasonable rules to promote the objectives of his insurance program. These objectives are to provide broad coverage and maximum benefits at a minimal expense. Based upon experience and information, for example,[3] an employer may believe that the inclusion of maternity and related conditions as covered risks will result in excessive demands upon his fund and therefore will require either an increase in premiums for all employees or a

2. 6 F. E. P. Cases 1253 (1974).

3. The examples given here and elsewhere are intended to be illustrative only and are not intended to be all inclusive or to exclude other examples.

reduction in benefits to all employees. In those circumstances, the employer should be able to exclude maternity and related conditions as covered risks without being guilty of sex discrimination. This exclusion is consistent with the legitimate objectives of the disability program. Yet the E. E. O. C. by a brand new opinion guideline effective in 1972 says that the very exclusion of maternity benefits from benefit programs, without more, violates Title VII and the Appellee here urges that such an exclusion *per se* violates Amendment Fourteen.

This Court has not passed upon the constitutional issue or the more important and related issues concerning the E. E. O. C.'s guideline and *LaFleur* and *Cohen* do not reach these questions.

The *amicus* believes that this case provides an ideal vehicle for this Court to provide guidance to employers who come within the provisions of Title VII of the Civil Rights Act and either exclude maternity as a covered risk under insurance programs, or do not provide benefits for this condition on the same terms as they provide benefits for illness or injury. These issues presented here are of national scope and involve countless employers.

The *amicus* will first discuss the weight that should be given by courts to administrative guidelines, with particular emphasis on the weight that should be accorded to the E. E. O. C.'s 1972 guideline concerning pregnancy and childbirth. The *amicus* will then consider whether Title VII requires an employer to provide fringe benefits for maternity on the same terms as he provides these benefits for illness or injury. Finally, the *amicus* will discuss the constitutionality of the statute involved in this case.

ARGUMENT.

I.

THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S GUIDELINE RELATING TO PREGNANCY AND CHILD-BIRTH IS ENTITLED TO NO WEIGHT BY THIS COURT.

It is the position of the *amicus* that the Commission's Sex Discrimination Guidelines are merely current opinions of the Commissioner as to the meaning of Title VII[4] and that, therefore, these guidelines do not have the force of law. Consequently, this Court has complete liberty to decide whether or not it will accord weight to the Commission's opinions, and if so, how much. In this proceeding, the *amicus* believes that this Court should give no weight whatever to the Commission's opinion that fringe benefits should be provided for pregnancy and maternity on the same terms as these benefits are provided for illness or injury.[5]

A. In General an Agency's Opinions Are Distinct from an Agency's Legislative Rules.

At the outset, however, it is well to distinguish between an agency's opinions or interpretative rulings on one hand and its legislative rules on the other. This distinction is background necessary to fully appreciate the *amicus'* position that the Commission's guidelines are but the Commissioner's *current opinions.*

A well reasoned judicial treatment of the distinction between agency opinions or what the court calls "interpretative rulings" and legislative regulations is found in *Gibbson Wine Co., Inc.* v. *Snyder,* 194 F. 2d 329 (CADC, 1951) at 333. The court stated:

4. Title VII of the Civil Rights Act of 1964, Sections 701-16, 42 U. S. C. Sections 2000e to 2000e-15 (1964).

5. Section 1604.10 (effective April 5, 1972.)

"The distinctive characteristics of interpretative rulings, as contrasted with so-called regulations, have long been recognized. Administrative Officials frequently announce their views as to the meaning of statutes or regulations. Generally speaking, it seems to be established that 'regulations,' 'substantive rules' or 'legislative rules' are those which create law, usually implentary to an existing law; whereas interpretive rules are statements as to what the administrative officer thinks the statute or regulation means."

Professor Davis in his treatise on administrative law highlights this distinction:

"The distinction between interpretative rules and legislative rules is an essential part of our system, even though the Supreme Court has never provided a full-bodied discussion of it. A legislative rule is the product of an exercise of legislative power by an agency, pursuant to a grant (whether explicit or not) of legislative power by the legislative body; a court will no more substitute judgment on the content of a valid legislative rule than it will substitute judgment on the content of a valid statute. A legislative rule is valid if it is (a) within the granted power, (b) issued pursuant to proper procedure, and (c) reasonable.

"Interpretative rules are rules which do not rest upon a legislative grant of power (whether explicit or inexplicit) to the agency to make law. Interpretative rules usually interpret the statute, but sometimes they properly go beyond the statute, and when they do they are still called interpretative rules even though they are not interpretative in the literal sense."[6]

This distinction between an agency's opinions and its legislative rules is significant because as we will see "courts often substitute judgment as to the contents of an interpretative rule but almost always . . . refrain from substituting judgment as to the content of a legislative rule."[7]

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6. Davis, *Administrative Law Text*, Section 5.11 (1959).

7. *Id.* at Section 5.03.

B. An Agency's Opinions Have No Force or Effect of Law and Courts Have Liberty to Determine What Weight to Give to Them When Considering Statutory Issues.

This Court in *Zuber et al.* v. *Allen et al.*, 396 U. S. 168 (1969), discussed the weight given to administrative opinions and stated that while contemporaneous opinions are entitled to weight they are "only one input in the interpretational equation. . . . The Court may not, however, abdicate its ultimate responsibility to construe the language employed by Congress." (at 192-193)

The lower courts have fully agreed with *Zuber*. A particularly instructive case that discusses what judicial deference is given to administrative opinions is *O'Neil* v. *United States*, 281 F. Supp. 359 (ND Ohio ED 1968) affirmed 410 F. 2d 888 (CA 6, 1969). In that case the court observed that all regulations are not entitled to equal weight before the courts.

> "A court has greater freedom when passing on an interpretative rule than a legislative one. In the case of an interpretative rule, the legislature has not delegated power to an agency to make a rule which is binding upon the courts. An interpretative regulation does not prevent a reviewing court from substituting its judgment on questions of desirability or wisdom. 'The law is embodied in the statute and the court is free to interpret the statute as it sees fit.' "

The Court in *American Newspaper Publishers Association* v. *Alexander*, 294 F. Supp. 1101, 1103 (DC DC 1968) bluntly stated that an interpretative rule is ". . . not a regulation having the force or effect of law."

We have now seen generally the distinction between administrative opinions and legislative rules and also that it is important for courts to make this distinction in order to define the extent of their powers to interpret statutes when confronted with administrative regulations. When confronted with agency

opinions a court may substitute its judgment for the agency's and reach a different conclusion than did the agency on the same facts.

C. The E. E. O. C.'s Sex Discrimination Guidelines Are an Agency's Opinions and Consequently Do Not Have Effect of Law.

It is apparent that the E. E. O. C. guidelines are not legislative rules as the courts and commentators have defined that term, but are merely expressions of current opinions by the administrative officers as to the meaning of the statute. Therefore, these guidelines do not have the force of a law binding upon a court, and a court is at liberty, when confronted with an issue relating to Title VII, to substitute its judgment on "questions of desirability and wisdom" and to reach a different result than did the Commissioner when he considered the same issue. The interpretive nature of the guidelines is seen from the guidelines themselves:

> "Because the material herein is interpretative in nature, the provisions of the Administrative Procedure Act (5 U. S. C. 553) requiring notice of proposed rule making, opportunity for public participation, and delay in effective date are inapplicable." 29 C. F. R. Part 1604 (1972).[8]

This Court and lower courts have recognized that the E. E. O. C.'s guidelines are opinions and consistent with judicial decisions regarding administrative opinions generally have held *that these guidelines do not have "the force or effect of law." American Newspaper Publishers Association* v. *Alexander, supra* at 1103, (emphasis supplied). *Espinoza* v. *Farah Manufacturing Co.*, ____ U. S. ____, 38 L. Ed. 2d 287, 6 F. E. P. Cases 933.

Indeed there is reason that this Court should not defer to any extent to the E. E. O. C.'s guidelines. On March 24,

8. These guidelines are based on 42 U. S. C. Section 2000e-12(b) (1970) which suggests that such opinions may be issued by the Commission.

1972 Congress invested the Commission with prosecutorial powers. Yet while giving these new prosecutorial powers to the Commission, Congress did not accord to the Commission the power to make substantive law. The relevant legislative history leaves room for no reasonable doubt, since in Section 713(a) of Title VII (42 U. S. C. 2000e-12(a)), the word "procedural" was inserted by amendment on the floor of the House to make clear that the Commission did not have the power to make substantive regulations.[9]

The Commission was rather required to prosecute its cases in a federal district court, and it is this court that is to interpret the Civil Rights Act and apply that law. There is no doubt that Congress can bestow upon an agency the power to make substantive law. The National Labor Relations Board is an example of an agency to which Congress has given the power to create a body of substantive labor law. Within the statutory framework of the National Labor Relations Act, the General Counsel and the Board itself have the power to create a substantial body of labor law and courts have justifiably deferred to the Board's expertise.[10] Because the Commission has not been given the power to create substantive law, its guidelines may now inform the public of what the prosecutor considers illegal, but there is no reason for a court to accord the prosecutor's views a special sanctity or to view them as a body of law having binding force. The Commission's opinions are just that—its view of what constitutes illegal conduct and a court should treat them as nothing else. The Commission, like the Justice Department, has been accorded only prosecutorial functions and like the Justice Department cannot fashion the law it elects to present. This is the fundamental distinction between agencies given only prosecutorial roles and those, such as the National Labor Relations Board, to which Congress has given

9. 110 Cong. Rec. 2575 (1964).

10. The Board's rules concerning what constitutes an effective contract bar to a representation election are one example.

adjudicative and regulatory functions as well as prosecutorial duties. When dealing with a Commission in its new prosecutorial function, the court has the ultimate responsibility to determine the law and it must not abdicate this responsibility to the prosecutor by deference to his guidelines.

D. The Agency's 1972 Opinion Declaring That an Employer Must Provide Benefits for Maternity or Pregnancy on the Same Terms As He Provides Benefits for Illness or Injury Is Entitled to No Weight by This Court Because It Is Inconsistent with Prior Opinions, Because It Was Not Issued When Title VII Was Enacted, and Because It Demonstrates None of the Thoughtfulness Commonly Associated with Agency Expertise.

While we have seen that E. E. O. C. guidelines do not have a force of law, and that a court need not defer to them when considering a Title VII issue, the crucial question here is what, if any, weight should this Court give to the Commission's opinion that "(b) . . . benefits . . . shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities."[11]

The amicus contends for reasons expressed in subpart C that this Court should give no weight to this guideline. There are in addition other important reasons why no weight should be accorded to this guideline.

Courts confronted with similar questions involving opinions of other agencies, have applied a variety of factors[12] in evaluating the weight to give to these opinions. Accordingly, guided by these factors, we shall examine the Commission's 1972 opinion.

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11. Section 1604.10 (effective April 5, 1972).

12. *Espinoza* v. *Farah Manufacturing Co., supra; Skidmore, et al. v. Swift and Co.*, 323 U. S. 134 (1944); *In Re: Petition of Chin Thloot Har Wong*, 224 F. Supp. 155 (D. C. SDNY, 1963) at 165; Davis, *Administrative Law Text*, Section 5.03 (1959).

The factors that are commonly recognized by courts when they evaluate the weight to give administrative opinions are:

First, was the opinion a contemporaneous construction of the statute it purports to interpret?

Second, has the opinion been applied consistently by the agency over a long period of time?

Third, was the opinion issued with evident thoughtfulness?

Fourth, has the agency demonstrated expertise in dealing with the subject discussed by the opinion?

When these factors separately or in confederation are applied to the Commission's 1972 opinion concerning pregnancy and maternity benefits, it will be clear that this opinion is entitled to no weight by courts when they decide Title VII issues.

1. Was the Commission's 1972 Opinion a Contemporaneous Construction of Title VII, and Has It Been Applied Consistently by the Commission for a Long Period of Time.

The short answer to both parts of this question is "no." However, a brief odyssey through the Commission's pronouncements on fringe benefits and pregnancy is necessary to fully appreciate the explicit inconsistency of the Commission's position.

Between 1966, shortly after Title VII became effective,[13] and 1969 the Commission issued a number of opinions, announcing how it would apply Title VII when encountering the issue of fringe benefits and pregnancy. These opinions reveal a consistency of approach to this issue and generally informed employers that *they were not required to provide the same fringe benefits for pregnancy as they provided for illness or injury.*

---

13. Title VII of the Civil Rights Act of 1964 was enacted on July 2, 1964, with an effective date of July 2, 1965.

For example, in an opinion letter, dated November 10, 1966, sixteen months after Title VII became law, the Commission's General Counsel stated:

"In a recent opinion letter regarding pregnancy we have stated, 'The Commission policy in this area does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees.' Therefore, an insurance or other benefit plan may simply exclude maternity as a covered risk, and such an exclusion would not in our view be discriminatory."

Five days later, the General Counsel said:

"Gentlemen:

You state that under your collective bargaining agreement *male and female employees are granted sick leave with pay. Female employees, however, are granted maternity leaves without pay;* although their services are not terminated. You inquire whether this policy is in compliance with Title VII of the Civil Rights Act of 1964.

The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees. Accordingly, we believe that to provide substantial equality of employment opportunity for both sexes, there must be special recognition for absence due to pregnancy, and for this reason have stated that, generally speaking, a leave of absence should be granted for pregnancy whether or not it is granted for illness. *On the other hand, we do not believe that an employer must provide the same fringe benefits for pregnancy as he provides for illness, and, consequently, it is our view that the policy you describe is not in violation of Title VII.*

Sincerely yours,

CHARLES T. DUNCAN
General Counsel"

(November 15, 1966)
(emphasis supplied)

A month later, he said,

> "You have requested our opinion whether the above exclusion of pregnancy and childbirth as a disability under the long-term salary continuation plan would be in violation of Title VII of the Civil Rights Act of 1964.
>
> "In a recent opinion letter regarding pregnancy, we have stated, 'The Commission policy in this area does not seek to compare an employer's treatment of illness or injury with his treatment of maternity since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees.' Therefore, it is our opinion that according to the facts stated above, a company's group-insurance program which covers hospital and medical expenses for the delivery of employees' children, *but excludes from its long-term salary continuation program those disabilities which result from pregnancy and childbirth would not be in violation of Title VII.*" (December 9, 1966, as reported in CCH Employment Practices, 12-21-66, paragraph 17, 334-44) (emphasis supplied)[14]

Within sixteen months after the enactment of Title VII, then, the Commission repeatedly advised employers that they need not "provide the same fringe benefits for pregnancy as [they provided] for illness . . ." and that the Commission did not require comparable treatment for illness and pregnancy.

The Commission still demonstrating consistency maintained this position through 1969. On June 19, 1969, a representative

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14. The record in *Gilbert* v. *General Electric Company*, Civil Action No. 142-72-R, DCED Va. reveals: (1) that the Commission discussed this policy and various alternatives before issuing this and other opinion letters, (pages 566-567); (2) the term "fringe benefits" as interpreted by the Commission included wage continuation, sick pay, hospitalization and any other benefit applied in the case of absence due to illness (page 563); (3) the commission's policy as expressed in these opinion letters applied whether the benefit program was financed on a contributory basis or solely by the employer. (page 564). This portion of the record is reproduced in Appendix A attached hereto.

of the Commission announced that the Commission "views pregnancy as a temporary disability, and has not to date equated it with sickness."

The Commission then ruled that an employer *may grant maternity leave without pay even though it provided pay for sick leaves.*[15]

The Commission's consistency came to an abrupt halt on April 5, 1972. Then, for the first time the Commission declared in an opinion guideline that pregnancy and illness were the same after all for the purposes of an employer's disability policy.[16] The 1972 opinion, of course, has not been consistently applied for a long period of time because it is only the most recent Commission view on the subject and because it is totally and remarkably inconsistent with prior opinions issued over the last several years. Moreover, it is these prior opinions, rather than 1972 opinion, that are contemporaneous constructions of Title VII. What weight then can be given to this 1972 opinion? Applying the criteria of consistent application and contem-

15. CCH, *New Developments, Paragraph* 8804 E. E. O. C. Attorney Discusses Sex Discrimination and Fringe Benefits Under Title VII, 1964 Civil Rights Act.

16. Whether expressed in a guideline, letter or reported investigation of a specific charge, the Commission's statements and views are merely its *opinions* concerning *inter alia* whether particular conduct violates Title VII. Any so called "E. E. O. C. decisions" which may concern the subject in question are not, therefore, decisions at all, but are merely reported investigations following a charge, and the report contains the investigators' or prosecutors' opinion that "reasonable cause" does or does not exist to believe Title VII has been violated. Moreover, the so called "decisions" have even less value than the guidelines. While a guideline is the expression of a current opinion by the administrator on the meaning of the statute, a reported investigation states merely that based on the *facts then present* in that case there is or is not *reasonable cause* to believe that the Act has been violated. Arguments or reasons advanced as the case progresses can alter that opinion and it is of little guidance unless a subsequent case is factually "on all fours." Thus, while the arguments in this brief are directed primarily against the Commission's 1972 guideline opinion, these arguments, here and elsewhere, may apply equally to any investigation reports that may represent a change in direction by the Commission.

poraneous construction, the answer is, "none." Moreover, the answer does not change when the remaining relevant criteria are applied.

2. Was the 1972 Opinion Issued with the Evident Thoughtfulness That Marks Agency Expertise?

There is no evidence that the new 1972 opinion was formulated with consideration for alternatives or concern for ramifications. Moreover, when the Commission, after several years of consistently applying the Act, abruptly changed its interpretation and consequent application of the Act, it must prove clearly and convincingly that its new interpretation is justified by a change in Congressional policy, or by new facts not previously in existence.[17] Only if it meets this explicit proof burden is its new opinion entitled to any judicial consideration. The Commission has offered no such proof here.[18] Indeed, its astonishing and erratic shift belies its obvious claim of expertise.

This much, then is now clear. In determining whether to defer or not and in evaluating the weight to give an agency's opinion as to the meaning of a statute, the courts commonly consider a variety of factors. When the Commission's 1972 opinion concerning fringe benefits and maternity or pregnancy is viewed in light of these factors, it is clear that this opinion is entitled to neither weight nor deference.

After promulgating the challenged guideline the Commission apparently hoped to gain quick judicial approval under the authority of *Griggs* v. *Duke Power Company*, 401 U. S. 424 (1971). However, *Griggs is distinguishable* and indeed, supports the view that the guideline in question here is entitled to no weight. For one thing when *Griggs* was decided the Commission did not have prosecutorial powers. For another,

17. *Newmon* v. *Delta Air Lines, Inc.*, 7 F. E. P. Cases 26 (USDC ND Ga., 1973). There, the court held that the denial of employment benefits to employees on maternity leave did not violate Title VII.

18. *Newmon* v. *Delta Air Lines, Inc., supra.*

the statement by this Court in *Griggs* that agency guidelines were entitled to "great deference"[19] must not be overvalued, but rather should be confined to the facts of that case. As the Sixth Circuit in *Espinoza* v. *Farah Manufacturing Co., supra* observed:

> "In *Griggs*, the Court found that '(s)ince the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress.' 401 U. S. at 434. Moreover, in that case the Court made an independent analysis of the pertinent legislative history and decided that 'the conclusion is inescapable that the E. E. O. C.'s construction . . . comports with Congressional intent.' 401 U. S. at 436"[20]

Here, unlike *Griggs*, as will be demonstrated *infra* in part II, A there is no evidence whatever that Congress intended an employer to provide fringe benefits for pregnancy on the same terms as he provides benefits for illness or to treat these distinct conditions in the same manner.[21]

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19. at 433-434.

20. *Espinoza* v. *Farah Manufacturing Co.*, 462 F. 2d 1331 (CA 6, 1972).

21. There was little or no legislative history on sex discrimination. *Newmon* v. *Delta Air Lines, Inc., supra.*

II.

AN EMPLOYER NEED NOT PROVIDE FRINGE BENEFITS FOR MATERNITY OR CONDITIONS RELATED TO PREGNANCY ON THE SAME TERMS AS HE PROVIDES THESE BENEFITS FOR ILLNESS OR INJURY.

A. Congress Did Not Intend to Require That Employers Provide Fringe Benefits for Pregnancy and Maternity in the Same Manner That These Benefits Are Provided for Illness or Injury.

In considering Congressional purpose or intent here, it is well to begin by examining the function of the E. E. O. C. and its approach to fringe benefits and maternity. The E. E. O. C. is the agency charged by Congress with the administration, interpretation and enforcement of Title VII of the 1964 Civil Rights Act. It can logically be presumed, therefore, that Congress was well informed as to the interpretations its Commission was applying to Title VII, particularly during early stages of the Commission's existence. Because the Commission consistently and explicitly stated for *several years* since the enactment of Title VII that employers were not required to provide the same fringe benefits for pregnancy as they provide for illness or to treat these distinct conditions in the same manner, Congressional awareness of this interpretation can be legally presumed.[22] Despite being aware that the Commission did not seek to compare an employer's treatment of pregnancy with his treatment of illness or injury, Congress did nothing to override the Commission's interpretation and its consequent application of that part of Title VII. Congress did not by statutory amend-

22. Congress has expressly provided that an employer's reliance on the Commission's interpretative opinions is a valid and complete defense in an E. E. O. C. proceeding. Erroneous interpretations if raised as valid defenses to E. E. O. C. proceedings could seriously frustrate the effective implementation of the Act. Thus, it is readily apparent that Congress intended to be kept informed of the Commission's interpretations. (42 U. S. C. 2000e-12b (1970).)

ment, or otherwise seek to amend or to modify the Commission's interpretation.

Had Congress intended to require an employer to treat pregnancy and illness alike when devising or applying a personnel maternity policy, it had ample opportunity to manifest this intent in 1972 when it enacted a number of amendments to the Civil Rights Act of 1964. In a parallel situation involving religion, Congress required an employer to accommodate his work schedules and employment policies to the individual religious practices of his employees. This occurred when Congress reacted to the Fifth Circuit's decision in *Dewey* v. *Reynolds Metal Co.*[23] There, the court was faced with a Commission guideline that required an employer accommodate his business requirements to the religious beliefs of his individual employees or be held in violation of Title VII. Pursuant to this guideline, an employee, Dewey, charged that his employer discharged him for refusing, because of his religious beliefs, to arrange for a replacement to perform Sunday overtime work. The court held;

> "The legislative history of the Act expresses a clear Congressional intent to inhibit only discrimination against an individual because of his race, color, religion, sex or national origin. . . .
>
> Nowhere in the legislative history of the Act do we find any Congressional intent to coerce or compel one person to accede to or accommodate the religious beliefs of another. The requirement of accommodation to religious beliefs is contained only in the E. E. O. C. regulations which in our judgment are not consistent with the Act." at 334

In effect the court recognized that while the Act prohibited an employer from constructing his hiring, promotion or discharge policies so as to discriminate because of religion, the Act did not require an employer to adjust his personnel policies to accommodate the religious practices—such as the manner

23. 402 U. S. 689 (1971), 429 F. 2d 324 (CA 6, 1970).

of Sabbath worship—of his individual employees. Congress recognized that the court's interpretation was accurate because it reacted by amending the Act in 1972 to require employers to adjust their work schedules and personnel policies to accommodate the various religious practices of their employees.

Because religion and sex are referred to in the 1964 Act in a like manner, it is reasonable to assume that Congress intended the Employer's obligations in the area of sex discrimination to be similar to those in the area of religious discrimination. By the 1964 Act Congress intended neither that an employer accommodate his personnel policies to individual religious practices nor that an employer pay maternity benefits in the same manner as he provides benefits for illness or injury. However though Congress in 1972 amended the 1964 Act to specifically enlarge an employer's responsibility in the area of religious discrimination, Congress did not enact an amendment requiring an employer to treat pregnancy and illness alike and to provide benefits for pregnancy on the same terms as he provides benefits for illness. This Congressional silence is even more revealing when the following facts are considered:

1. Congress had ample precedent had it desired to require an employer to treat pregnancy and illness in the same manner. In 1968, considering the Railroad Unemployment Insurance Act of 1946, Congress amended the definition of a day of sickness in that Act to include with respect "to a female employee, a calendar day on which because of pregnancy, miscarriage, or the birth of a child (i) she is unable to work or (ii) working would be injurious to her health."

2. Congress had access to arbitrators' decisions which for two decades equated pregnancy and illness and required an employer to apply the same benefit policies to both.[24] Yet

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24. *Middleton Board of Education*, 56 LA 830 (1971); *National Lead Co.*, 18 LA 528 (1952); *Republic Steel Corp.*, 37 LA 367 (1961).

despite these decisions Congress chose not to require that employers treat pregnancy and illness alike in fringe benefit programs.

It is apparent, therefore, that had Congress desired to amend the Civil Rights Act in 1972 or at any time to require employers to treat pregnancy and illness in a similar manner when formulating or implementing benefit programs, Congress would have enacted such an amendment. It enacted an amendment in the area of religious discrimination, and the Railroad Unemployment Insurance Act specifically treats maternity as a form of illness. Congressional silence, then, must be taken to mean that Congress has no intention in 1972 to require an employer, when devising or implementing his employment policy, to equate pregnancy and illness and to treat these distinct conditions in the same manner with respect to fringe benefits, or related matters.

The significance of Congressional intent is highlighted by this Court's recent decision in *Espinoza* v. *Farah, supra.* There, this Court refused to equate discrimination based on citizenship with the statutorily proscribed discrimination based on national origin, since such an equation would contravene Congressional intent. It follows that this Court should not require an employer to treat the distinct conditions of pregnancy and illness alike when constructing a benefit program since such a requirement would be contrary to Congressional intent.[25]

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25. In reaching its decision in *Espinoza*, this Court refused to defer to an E. E. O. C. guideline when the application of this guideline would be inconsistent with the intent of Congress and with the Commission's views as previously expressed in opinion letters. Therefore, in the instant case, the guideline in question should be given no effect by this Court not only for the reasons advanced in part I, D, *supra*, but also because the guideline is contrary to Congressional intent.

B. The Commission Consistently Recognized That an Employer Need Not Treat Pregnancy and Illness Alike When Providing Benefits, and the Court May Rely on These Precedental Guides When, As Here, the Commission Without Persuasive Reason Departs from Its Own Precedent.

After years of consistently saying that employers need not treat pregnancy and illness alike,[26] the Commission, in a dramatic shift, equates pregnancy and illness for benefit policy purposes. What evidence was offered by the Commission to justify its turn about? The Commission did not hold public hearings or invite public debate. It did not suggest that it suddenly devined a heretofore unnoticed Congressional intent. It did not claim to have discovered the law. It simply pronounced its guideline and will seek to win for it judicial approval so that its newest opinion can be raised to the level of judicial fiat.

The *amicus* believes that the Commission's departure from its own precedent can be justified, if at all, only if the Commission proves by persuasive evidence that this radical shift was caused by very good reasons, *e.g.*, a newly announced Congressional purpose directly relating to the Commission's new theory or by facts that did not exist when the Commission pronounced its earlier opinions. Because the Commission at no time has demonstrated that such reasons exist, its departure from its own precedent should not be countenanced by this Court, particularly when the Commission's new opinion will cause substantial changes in employer-employee relations including major revisions in employer benefit programs.

Strong support for the *amicus'* position is found in the Fourth Circuit's opinion of *N. L. R. B.* v. *Quality Manufacturing Co.*[27] and the *amicus* offers that court's well reasoned opinion here as a guide.

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26. See Section I, part D, *supra.*

27. 481 F. 2d 1018 (CA 4, 1973); Petition for Writ of Certiorari now pending No. 73-765.

In *Quality*, the National Labor Relations Board purporting to interpret the Labor Act held for the first time in its history that an employer violated that Act by discharging an employee who insisted upon union representation at a meeting called by the employer to investigate the employee's conduct. The Court rejected the Board's holding because it "departed from existing case law[,]" and because,

> ". . . never has it been thought, as the Board would hold here, that [statutory] rights require an employer to permit an employee to have a union representative present whenever the employee 'has reasonable ground to fear that the interview will adversely affect his continued employment or even his working conditions.' "

The Court observed that the Board did not justify or support its "new theory" by a persuasive analysis of the Labor Act or of legislative history, and concluded that the Board has no power to "alter or rearrange employer-employee relations to suit its very whim." The parallel between *Quality* and this case is clear. Both in *Quality* and in this case, an agency claiming to interpret its statute departed from its own precedent without advancing persuasive reasons for doing so. In both *Quality* and in this case, the new agency opinion will have considerable impact on employer-employee relations. As did the court in *Quality* this Court should also reject an agency's departure from its own precedents when the agency advances no cogent reasons to justify its shift.

Rather than sanctioning and deferring to this abrupt departure from precedent, this Court, consistent with Congressional intent, should permit employers to treat maternity and sickness or injury differently when planning and implementing fringe benefit programs, particularly when the employer advances cogent business reasons to justify this difference in treatment.

C. An Employer May Exclude Pregnancy, Maternity and Related Conditions from His Benefit Program Without Violating Title VII When the Exclusion Is Related to the Program's Legitimate Objectives.

1. Maternity Benefits May Be Excluded in Order to Enable the Program to Achieve Legitimate Objectives.

While it is true that pregnancy and maternity are unique to females, it does not follow that an employer violates Title VII when he excludes those conditions or related conditions as covered risks under his benefit or disability programs. The objective of these programs is to provide the broadest coverage and maximum benefits for as little cost to the employer or employees as possible. An employer without violating any law should be able to formulate rules to promote this objective. Based on study or information, an employer may determine that the inclusion of a disease, such as heart disease, which happens to affect both sexes, will result in excessive demands upon his fund and therefore will require either an increase in contributions by all participants or a reduction in benefits to all participants. Under those circumstances, it is clear that the employer is able to simply exclude heart disease as a covered risk without violating any law. Similarly, based on experience, study or information, for example, an employer may determine that the inclusion of maternity or related conditions will result in excessive demands on his fund or require increased contributions or reduced benefits.[28] Under these circumstances, an employer should be able to exclude maternity and related conditions as covered risks without being guilty of sex discrimination even though the excluded conditions affect only one sex. His decision to ex-

28. The Supreme Court of the State of California stated in *Clark v. California Employment State Com.*, 166 C. A. 2d 326 (1958) that it is "common knowledge" that a condition "arising from pregnancy is classified and excluded from coverage provided by private contracts of health and accident insurance in order to effect a premium rate lower than is required in the absence of such exclusion." at pp. 331 and 332.

clude maternity and related conditions is fully consistent with his desire to protect the fiscal integrity of his benefit program and to provide maximum benefits to all employees at the lowerest cost. The employer should not, in such circumstances, be found to have violated Title VII.

2. Precedent Supports an Exclusion Which Is Related to the Legitimate Objectives of a Program.

Though maternity benefits are excluded in order to enable the benefit or insurance program to retain fiscal integrity and to provide maximum benefits at the lowest cost, it is settled that exclusions or limitations based upon economic considerations are valid and legitimate. *O'Gorman and Young* v. *Hartford Insurance Co.*, 282 U. S. 251 (1930); *Borden's Co.* v. *Baldwin*, 293 U. S. 194 (1934). In *O'Gorman*, a New Jersey statute regulated and limited the amount of commission that could be paid to fire insurance agents. This Court found that it was reasonable to conclude that a high commission cost to an insurance company may result in high insurance premiums for customers or in impairment of the financial stability of the insurance company, thereby defeating the objectives of fire insurance programs to provide reliable coverage at reasonable rates. Here, it can be reasonably said that the high cost of pregnancy benefits may result, for example, in increased employee contributions to the employer's benefit program or in impairment of the financial stability of that program thereby defeating the program's objective to provide maximum coverage at reasonable rates. This Court permitted the State to limit commissions in order to further the obectives of the insurance programs. This Court, by analogy, should permit employers to limit or eliminate the cost of pregnancy benefits in order to further the objectives of their benefit plans.

Similarly, if the cost of prostate operations increased, an employer would be able to exclude this operation as a covered risk, if in his judgment inclusion would defeat the goal of his

benefit program, without being guilty of unlawful sex discrimination. It is overly simplistic to conclude that by excluding a condition occurring to only one sex from his benefit program an employer *without more* unlawfully discriminates against that sex. Such a conclusion overlooks the rational practical judgments that an employer must make if he is to maintain the objectives of his program and automatically equates an employers' attempt to construct a comprehensive benefit program at a minimal cost to purposeful discrimination against a group or a class.

Not only does precedent support the validity of exclusions based upon economic considerations, but also authorities deciding issues arising under Titles VI and VII are in accord with the *amicus'* position.

On analysis, *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), while frequently cited by plaintiffs in Title VII proceedings, is in accord with the positions herein asserted. There, the employer required as a condition of employment that applicants have a high school education or that they pass a standardized general intelligence test. These requirements operated to disqualify Blacks at a substantially higher rate than white applicants. Because these requirements were not shown to be related to successful performance of the job for which the applicants were being considered, this Court held that the employer violated Title VII by maintaining these requirements, even though the employer did not intend to discriminate against Blacks. This Court stated that, "If an employer practice which operates to exclude Blacks cannot be shown to be related to job performance, the practice is prohibited." p. 431.

While this Court in *Griggs* found that the requirements *were unrelated to measuring job performance, and, therefore, discriminatory,* this Court stated that nothing in the Act prevents an employer from using tests which relate to job performance and employers may require applicants to be fit for the job.

In *Jefferson* v. *Hackney*,[29] this Court amplified and interpreted this aspect of *Griggs*. This *Court* stated, at 549:

> "We have, however, upheld the findings of nondiscriminatory purpose in the percentage reductions used by Texas, and have concluded that the variation in percentages *is rationally related* to the purpose of the separate welfare programs. The Court's decision in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), is therefore inapposite. In *Griggs*, the employment tests having racially discriminatory effects were found not to be job related, and *for that reason were impermissible under the specific language of Title VII of the Civil Rights Act*. Since the Texas procedure challenged here is related to the purposes of the welfare program, it *is not* proscribed by Title VI simply because of the variances in the racial composition of different categorical programs." (Emphasis supplied)

In both *Griggs* and *Jefferson* the challenged procedures had racially discriminatory effects. The job testing procedure in *Griggs* violated Title VII because it was not related to job performance. In *Jefferson* the differences in benefit payments did not violate Title VI because it could be reasonably said that these differences in payment were related to the legitimate purposes of the welfare program.

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29. 406 U. S. 535 (1972). *Jefferson* involved a state's determination to allocate a fixed pool of welfare money by paying AFDC benefits at 75% of need while paying other insurance programs at a higher percentage, e.g., old age assistance at 100% of need and aid to blind at 95% of need. AFDC recipients challenged this determination by alleging racial discrimination, since the proportion of AFDC recipients who were black or Mexican-American was higher than the proportion of aged, blind or disabled welfare recipients who fell within these minority groups. This Court found no invidious discrimination under the Fourteenth Amendment and said racial discrimination was not proven. This Court did not substitute its judgment for the State's determination on how to best allocate the welfare money, even though different policy judgments were possible, because the State's conclusion that the aged and infirm were less able to bear the hardships of an inadequate living standard than were the young AFDC recipients was reasonable.

In accord is *Wallace* v. *Debron Corp.*, 368 F. Supp. 837 (DC Mo., 1973) 6 F. E. P. Case 316.

In accord with *Jefferson* and *Griggs*, then, where there is a reasonable basis to conclude that the exclusion of maternity fringe benefits from employer benefit or insurance programs is related to the furtherance of the programs' objectives, the exclusion does not violate Title VII.

Moreover, the effect of the employment requirements in *Griggs* was to deny a large segment of the population of a North Carolina County employment opportunities. These requirements caused discrimination and had a pervasive effect against virtually the entire black population of that county because they did not have the educational background to meet the employer's requirements. Therefore, in *Griggs*, this Court employed a stringent business necessity test. Here, the exclusion from benefit programs of maternity benefits adversely affects only a portion of one sex some of the time while at the same time having a salutary effect on members of that sex generally as well as on all other employees. The exclusion here is the result of a conscious choice to afford other benefits to both women and men which would be otherwise unavailable. It must be kept in mind that when an employer has only a finite amount of money to expend on coverage for employees of both sexes, he must be accorded the right to determine how to utilize those funds most effectively for the benefit of all. Exclusions based solely on the variables of cost and comprehensiveness of coverage cannot rationally and automatically be attributed to any prohibited sex discrimination. For these reasons, the strict test utilized in *Griggs* cannot be applied here. Rather, where there is a *reasonable basis* to exclude maternity benefits from benefit or insurance programs, the exclusion cannot violate Title VII.[30]

30. In addition, while Griggs involved discrimination between different races, in the area of maternity fringe benefits there is no such comparable competition between sexes and a policy excluding maternity benefits does not, therefore, constitute illegal sex discrimination any more than the hiring of one Black rather than another would constitute illegal racial discrimination.

D. Judicial and Legislative Authorities Support the Position That the Exclusion of Maternity from Benefit Plans Is Not Illegal Sex Discrimination.

1. The Decision of This Court.

The desideratum of the policy underpinning the proscription against sex discrimination is to assure that all persons who are similarly circumstanced are treated alike regardless of their sex. Consequently, constitutionally or statutorily prohibited sex discrimination exists only when men and women who are otherwise similarly situated or in potential or actual competition are treated unequally solely because of sex rather than because of individual capabilities. As this Court has recognized:

> "Section 703(a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men—each having pre-school age children." [31]

An analysis of *Martin Marietta* and those other cases cited in footnote 31 yields the view that there can be no statutorily

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31. *Phillips* v. *Martin Marietta Corp.*, 400 U. S. 542, 544 (1971). This Court has reaffirmed this principle in *Frontiero* v. *Richards*, 93 S. Ct. 1764 (1973) and in *Reed* v. *Reed*, 404 U. S. 71 (1971); these cases arose under the Fourteenth Amendment. In *Frontiero*, a statute mandated "dissimilar treatment for men and women who are . . . similarly situated"; it provided that a service woman could not claim her husband as a dependent in order to obtain increased benefits unless he was, in fact, dependent upon her for over one-half of his support. In contrast a service man could claim his wife as a dependent without regard to whether or not she was dependent upon him for any of her support. Since both service men and women were otherwise equally qualified for dependent benefits, this Court held that the statute's disfavorable treatment of service women when compared with the treatment accorded to service men was based solely upon the considerations of sex. Consequently, the statute contravened the Fourteenth Amendment. Similarly, in *Reed* unconstitutional sex discrimination existed because a state's statute gave preference to the male when both a male and a female otherwise equally entitled applied to administer a decedent's estate.

or constitutionally proscribed sex discrimination in areas where the sexes are not similarly situated or in actual or potential competition. That is, only when a regulation may apply to both sexes will unequal treatment based soley upon sex violate the Fourteenth Amendment or Title VII. Since pregnancy is unique to women, reasonable regulations concerning benefits relating to pregnancy and maternity affect only women; thus, these regulations do not affect women in an area where they are similarly situated with men. Consequently, deprivation of maternity benefits does not constitute the proscribed dissimilar treatment for men and women who are similarly circumstanced, and reasonable maternity regulations denying pregnancy and maternity benefits do not constitute prohibited sex discrimination and do not violate Title VII.

Moreover, judicial opinions that have struck down discriminations based upon sex have been dealing with outmoded stereotypes based upon supposed differences between the sexes where those stereotypes produce distinct employment disadvantages for one sex.[32]

Consistent with the reasoning in these opinions, the real purpose of the sex discrimination law is to outlaw discrimination based upon outmoded sex stereotypes such as those mentioned in the administrative guidelines, including the characterizations that women are not capable of aggressive salesmanship or that men are less able to assemble intricate equipment.[33]

Unlike the so-called protective legislation that denied women jobs in favor of men, an employer's maternity regulation concerning benefits provided in the case of pregnancy does not operate in an area where men and women compete and does not create or perpetuate outmoded sex stereotypes. Accordingly,

32. *E.g. Weeks* v. *Southern Bell Telephone and Telegraph Co.*, 408 F. 2d 228 (CA 5, 1969); *Diaz* v. *Pan American World Airways, Inc.*, 442 F. 2d 385 (CA 5, 1971) *cert. denied.* 404 U. S. 950; and *cf. Boyce* v. *Safeway Stores, Inc.*, 351 F. Supp. 402 (DC DC, 1972).

33. 29 C. F. R., Section 1604.2.

there can be no sex discrimination when these regulations are implemented even if pursuant to these regulations the employer treats pregnant employees differently than other employees.

2. Legislative Authorities.

The legislative history of the proposed Equal Rights Amendment[34] is consistent with the view expressed in the foregoing section concerning the construction of the term "sex discrimination." Thus, fourteen members of the House Committee on the Judiciary expressed the following as their separate views on the version of the Equal Rights Amendment ultimately approved by Congress:

> "The legal principle underlying the Equal Rights amendment as proposed by Mrs. Griffiths [Rep. Martha Griffiths of Michigan] is that the law must deal with the individual attributes of the particular person and not with stereotypes or over-classification based on sex. However, the original resolution does not require that women must be treated in all respects the same as men. 'Equality' does not mean 'sameness'. As a result, the original resolution would not prohibit reasonable classifications based on characteristics that are unique to one sex. For example, a law providing for payment of the medical costs of child bearing could only apply to women. In contrast, if a particular characteristic is found among members of both sexes, then under the proposed amendment it is not the sex factor but the individual factor which should be determinative." [35]

It follows that if a physical characteristic such as the capability to bear children is unique to one sex, the proposed Equal

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34. The proposed amendment provides:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Section 3. This Amendment shall take effect two years after the date of ratification.

35. H. R. Rep. No. 92-359, 92nd Cong., 1st Sess. 7 (1971).

Rights Amendment does not prohibit legislation which regulates or applies to that unique characteristic, since the regulation could not deny equal rights to the sex not possessing this characteristic. Conversely, only when a characteristic is found in members of both sexes, a regulation must not make determinations or classifications based on sex or sex stereotypes but instead must consider the individual capability or classification.

It is thus undisputable that the statutory prohibition against sex discrimination does not embrace an employer's regulation which denies pregnancy and maternity benefits to female employees where this regulation is rationally related to the objective of the employer's benefit plan.

III.

THE STATE STATUTE EXCLUDING MATERNITY BENEFITS FROM AN INSURANCE PROGRAM DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

A regulation is measured against the Fourteenth Amendment when it creates a classification of individuals and then treats the individuals in this classification differently than other persons are treated. However, as Justice Frankfurter observed, "classification is inherent in legislation"; the Equal Protection Clause has not forbidden it.[36] Consistent with these observations, this Court has stated that the Equal Protection Clause does not forbid all statutory classification or discrimination, but only that discrimination that can be called arbitrary or invidious.[37] These observations were amplified by the illuminating discussion of Chief Justice Burger in *Reed* v. *Reed, supra.* There, a state statute gave mandatory preference for the male when both a male and a female otherwise equally entitled ap-

36. *Morey* v. *Doud,* 354 U. S. 457, 472 (1957).

37. "The Equal Protection Clause goes no further than the invidious discrimination." *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 489 (1955); *Morey* v. *Doud, supra; Lindsley* v. *National Carbonic Gas Co.,* 220 U. S. 61.

plied for letters of administration of a decedent's estate. The Chief Justice observed:

> "[T]his Court consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. (citations omitted) The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced are treated alike . . .'" at 75-76.[38]

Because this Court has interpreted the Equal Protection Clause as proscribing only arbitrary and invidious statutory discrimination, this Court has developed tests to determine whether or not a regulation creates an arbitrary or invidious discrimination; these tests have been called the "rational basis" or "compelling state interest" tests.

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38. The lower courts, too, have recognized that legislative and administrative enactments may treat different classes of persons in different ways without offending the Equal Protection Clause. In *Williams* v. *McNair*, 316 F. Supp. 134, 136 (DC DC, 1970), affirmed 401 U. S. 951, the Court stated:

> "The Equal Protection Clause of the Fourteenth Amendment does not require identity of treatment for all citizens, or preclude a state, by legislation, from making classifications and creating differences in the rights of different groups. It is only when the discriminatory treatment and varying standards, as created by the legislative or administrative classification are arbitrary and wanting in any rational justification that they offend the Equal Protection Clause." (Citations omitted.)

A. This Court Has Utilized the Rational Basis Test and the Compelling State Interest Test to Determine Whether or Not the Equal Protection Clause Proscribes a Statutory Classification and Discrimination.

The rational basis test has been generally employed when this Court has looked to the Equal Protection Clause in considering the constitutionality of a state's regulation. Under this standard of review, a state legislature is accorded considerable discretion in enacting regulations and is presumed to have acted within its constitutional power. A "legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate governmental interest."[39] The compelling state interest test, considered by this Court to be an exception to the usual standard of review expressed in the rational basis test, has been utilized by this Court only to review legislative enactments that abridged fundamental constitutional rights[40] or that involved classifications that can be labeled as "suspect".[41] This standard of review does not accord to legislative

39. *Frontiero* v. *Richardson, supra,* 1768 (1973); *Lindsley* v. *National Carbonic Gas Co., supra,* at 78-79; *Rapid Transit Corp.* v. *New York,* 303 U. S. 573 (1938); *McGowan* v. *Maryland,* 366 U. S. 420, 425 (1960).

40. *San Antonio Independent School District* v. *Rodriguez,* 93 S. Ct. 1278 (1973). There, this Court defined a fundamental right as a right that is "explicitly or implicitly guaranteed by the Constitution." In the earlier case of *Shapiro* v. *Thompson, supra,* Justice Stewart's observations are consistent with those of the court in *Rodriguez*:

> "The Court today does *not* 'pick out particular human activities, characterize them as "fundamental," and give them added protection . . .' To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands." 394 U. S., at 642. (Emphasis from original.)

41. *Frontiero* v. *Richardson, supra* (1973); *Shapero* v. *Thompson,* 394 U. S. 618 (1969); *McLaughlin* v. *Florida,* 379 U. S. 184 (1964); *Graham* v. *Richardson,* 403 U. S. 365 (1971); *Korematsu* v. *United States,* 323 U. S. 214, 216 (1944). These cases teach that when a statute creates a classification that is based upon "an

judgments the usual presumption of validity and requires that the state rather than the complainants justify discrimination found in the enactment by showing that a compelling state need is promoted by this discrimination.[42]

B. The Statute Excluding Maternity Benefits from the Benefit Program Does Not Violate the Equal Protection Clause of the Fourteenth Amendment.

1. The Statute Neither Creates Nor Involves a Suspect Classification.

Whether or not sex is a suspect classification, the statute requiring that maternity benefits be excluded from the benefit program does not create a classification based upon sex. Discrimination based upon a sex classification can occur only when persons similarly circumstanced are treated unequally based solely upon sex. See arguments presented *supra* in part II, D; *Reed* v. *Reed, supra; Frontiero* v. *Richardson, supra; Phillips* v. *Marietta supra.* Regulations concerned with physical characteristics unique to one sex, such as child-bearing do not contravene either the Constitution or Title VII.

This had been recognized by the E. E. O. C. for several years, and has been recently recognized by leading proponents of the proposed Equal Rights Amendment to the Constitution:

> "Like private action, governmental action dealing with a physical characteristic unique to one sex would not be affected by the equal rights amendment. Where a law deals

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immutable characteristic determined solely by the accident of birth," and then imposes special disabilities upon members of that classification, the classification has been treated as suspect, subjected to strict judicial scrutiny, and allowed only if shown to be necessary to promote a compelling governmental interest. This Court has held that race, alienage and national origin are inherently suspect because these characteristics frequently bear "no relation to ability to perform or contribute to society." *Frontiero* v. *Richardson supra,* 1770.

42. *Frontiero* v. *Richardson, supra; Shapero* v. *Thompson, supra; McLaughlin* v. *Florida, supra; Graham* v. *Richardson, supra; Korematsu* v. *United States, supra.*

> with a physical characteristic unique to one sex, equality between the sexes could not be achieved, for such a law could not apply in practice to both sexes. Therefore, the equal rights amendment would not affect laws dealing with a physical characteristic unique to one sex, such as laws governing childbearing, sperm donation, or criminal acts capable of being committed by members of only one sex." (Hearings before Subcommittee No. 4 of the Committee on the Judiciary, House of Representatives, 92nd Cong., 1st Sess., on H. J. Res. 35, 208, and Related Bills and H. R. 916 and Related Bills 40 (1971).)

Furthermore, even if sex is to be considered to be a suspect classification because it is an immutable characteristic determined solely by the accident of birth and because it bears no relation to ability to perform or contribute to society,[43] pregnancy, unlike sex, is not an immutable characteristic and it cannot be said that pregnancy bears no relation to ability to perform or to contribute to society. Consequently, following the reasoning in *Frontiero* it is clear that pregnancy cannot be a suspect classification even though sex, race, and national origin may be.

The basis of the holding in *Frontiero* is a further reason to distinguish that case from the instant case. In *Frontiero*, this Court added:

> ". . . any statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated,' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the [Constitution] . . .' We therefore conclude that, by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the Due Process clause of the Fifth Amendment in so far as they require a female member to prove the dependency of her husband." (at 1772.)

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43. Where the sole basis for a classification created by a statute was the sex of the individual involved, four Justices of this Court found the classification inherently suspect and subjected it to close scrutiny. *Frontiero* v. *Richardson, supra.*

Under the rationale of *Frontiero*, then, a regulation that treats men and women differently, would violate the Fourteenth Amendment only if it were maintained for the sole purpose of achieving administrative convenience. In the instant case, not only is the classification created by the exclusion of maternity benefits not sex based or suspect, but as a further distinction between this case and *Frontiero*, the purpose of the exclusion is not administrative convenience. Rather, the main purpose for the exclusion is to preserve the solvency of the benefit program as discussed by appellant in detail. Consequently, because administrative convenience is not the purpose of the statutory exclusion of maternity benefits, following *Frontiero* the statute does not violate the Equal Protection Clause.

Because the Statute does not create a suspect classification, the compelling interest test can be utilized to review the constitutionality of the statute which excludes maternity benefits from disability insurance programs only if that exclusion abridges a fundamental constitutional right.

2. The Exclusion of Maternity Benefits Does Not Abridge Fundamental Constitutional Rights.

This Court in rejecting the opportunity to create "substantive constitutional rights in the name of guaranteeing equal protection of the laws [,]" has stated that the key to discovering whether a right is "fundamental" lies not in its social significance but rather in determining whether the right is explicitly or implicitly guaranteed by the Constitution.[44]

It is difficult to imagine what fundamental right is abridged by the State's regulation excluding maternity benefits from its disability insurance program. If the right to bear children is a fundamental right it is in no way abridged by the State's regulation. Women bear children every moment without any hope of receiving maternity benefits from any source. Nor is there any

44. *San Antonio Independent School District* v. *Rodriguez*, *supra*, at 1297.

interference with the right to employment if that right is considered to be fundamental.[45]

3. The Statute Denying Maternity Benefits Under the State Benefit Program Does Not Violate the Equal Protection Clause When the Traditional or Reasonable Basis Standard of Review Is Employed to Evaluate Its Constitutionality.

The rational basis test employs three standards: first, a legitimate governmental purpose must be found to exist; second, the classification created by the statute must be rationally related to and further this legitimate governmental interest; third, all persons within the class must be treated alike.[46]

The benefit program has an objective to provide the broadest coverage and maximum benefits at the least cost to employees. Maternity benefits are excluded because the State believes, based upon study and deliberation that this exclusion is necessary if

45. In *Dandridge* v. *Williams, supra,* this Court recognized that the usual rational basis standard was to be employed when evaluating the constitutionality of state legislation that restricted the availability of employment opportunities. This recognition indicates that the right to employment opportunities is not a fundamental constitutional right requiring added protection by the application of the compelling interest test. *Dandridge* cited with approval *Goesaert* v. *Clarie,* 335 U. S. 464 (1948) and *Kotch* v. *Board of River Port Pilot Commissioners,* 330 U. S. 552 (1947). In *Goesaert,* this Court upheld a state statute prohibiting women other than wives and daughters of bar owners from becoming bar maids.

Consistent with the opinions of this Court is the Sixth Circuit's opinion in *Orr* v. *Trinter,* 444 F . 2d 128 (1971) cert. denied 408 U. S. 943 (1972), rehearing denied ..... U. S. ..... In *Orr,* a public school teacher alleged that his constitutional rights were violated because the School Board without reason refused to renew his teaching contract. He asserted that the Fourteenth Amendment prevented the State from depriving him of life, liberty and property without due process. While this was a case arising under the Due Process Clause, the court nonetheless in a statement relevant to these proceedings held that there is "no constitutionally protected right to government employment." at 133, 134.

46. *United States Department of Agriculture* v. *Moreno,* 93 S. Ct. 2821 (1973); *F. S. Royster Guano Co.* v. *Virginia,* 253 U. S. 412 (1920); *Frontiero* v. *Richardson, supra.*

the program is to remain solvent and meet its objectives. This has been set forth in detail by the appellant. Both the desire to keep the program solvent and the broader objective to provide disability benefits are valid State objectives. Exclusion of maternity benefits is necessary in the State's reasonable judgment to achieve those objectives. Consequently, it is clear that the State's regulation meets the standards of the traditional or reasonable basis test and the classification created by the regulation does not violate the Equal Protection Clause even though the regulation results in different classes of persons being treated in different ways.

While California excludes maternity benefits from its benefit program and while other states such as New Jersey and Rhode Island limit maternity payments to a fixed period[47] this difference merely reflects the individual judgment of the state legislatures. Such legislative discretion has been respected by this Court.

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results, in some inequality.' *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' *Metropolis Theatre Co.* v. *City of Chicago*, 228 U. S. 61, 69-70."

Whether a state should require a fixed period for maternity benefits or completely exclude maternity benefits from a benefit program depends upon many variables such as population that are best known to the legislature of each state. An application of the reasonable basis test by this Court when it determines the constitutionality of a statute, such as that involved in this case,

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47. Summary of State Labor Laws, U. S. Department of Labor, March, 1969.

will allow a state legislature to continue to exercise this discretion in a manner calculated to maintain the fiscal integrity of its benefit program and to achieve maximum benefit for all its citizens. However, application of the stricter standard of review may well foreclose any legislative discretion and by requiring the state to pay maternity benefits in the same manner as it compensates for illness or injury drastically curtail benefit programs. Indeed, as the dissenting opinion of Williams, District Judge, in the court below sets forth in detail, California's benefit program would be in jeopardy of insolvency if the State could not exclude maternity benefits from this program. In order that a state may continue to provide the broadest insurance coverage and maximum benefits within the limits of a reasonable employee contribution, this Court should apply the rational basis test when it evaluates the constitutionality of statutes such as the statute in the instant case. When this test is applied, the constitutionality of the statute in this case is assured.[48]

CONCLUSION.

For the foregoing reasons, the judgment of the court below should be reversed.

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48. The Amicus agrees not only with the conclusions reached by the appellant, but also with the arguments advanced by him.

APPENDIX.

Excerpts from the Official Transcript of Proceedings in Gilbert v. General Electric Company, No. 142-72-R, United States District Court for the Eastern District of Virginia:

* * * * *

[542] CHARLES DUNCAN was called as a witness by and on behalf of the defendant and, having been first duly sworn, was examined and testified on his oath as follows:

[549] *Direct Examination by Mr. Strauss.*

Q. Mr. Duncan, what is your occupation or profession?

A. I am an attorney at law admitted to practice in the District of Columbia.

[550] Q. Are you an officer of the District of Columbia Bar?

A. Yes. We have a unified D. C. Bar and I am this year President of that organization.

[551] Q. You were, were you not, at one time, employed by the EEOC?

A. Yes, I was.

Q. And in what capacity were you so employed?

A. I was General Counsel of the Equal Employment Opportunity Commission.

Q. And would you pinpoint the dates?

A. I believe I became General Counsel on August 8, 1965, and I took the oath of office as Corporation Counsel on October 31, 1966.

I assume I went off the EEOC payroll on that date, but I am not sure.

Q. You just don't remember, but in view—

A. It was sometime very late in October.

Q. In October, 1966?

A. That is correct.

* * * * *

[563] Q. Would you look at the last sentence, please, in the November 15 letter?

A. Yes.

Q. Would you explain, if you can, what the term "fringe benefits" means as used in that sentence?

A. Yes. Fringe benefits would include wage continuation, pay, pay in the nature of sick pay, hospitalization, any other benefit like that that applied in the case of absence due to other illnesses. But I think the chief thing was pay.

Q. Pay continuation, are you saying?

A. Yes.

Q. During pregnancy?

A. Yes. During the absence.

Q. Whether or not the pregnancy was covered by a disability policy, is that what this refers to?

A. No. I am trying to say that it was the Commission's position that pregnancy could be treated differently from a medical illness and that it was not necessary to make the same provision in the case of pregnancy as was made in the case of medical illness, be [564] it under company policy or under various sickness and health plans.

Q. Now, would you look, please, at the November 10 letter, Mr. Duncan, and in particular to the last two paragraphs thereof?

A. Yes.

Q. I note that there is a reference in there to an employee disability plan, benefit plan financed by both the employer and the employees.

Would the response set forth in the letter have been any different had the letter been concerned with a disability benefit plan sponsored by the employer alone?

A. No, clearly not. It was put that way because that is the way the question was put to us. It was our style to answer the question as asked. However the plan is financed, on a contributory basis or solely by the employer, the Commission's policy was that you did not have to provide the same benefits for maternity absence that you did for illness-caused absence.

* * * * *

[566] Q. Mr. Duncan, to get on with it, have you had occasion to read the guidelines on discrimination because of sex which were issued by the EEOC in 1972?

A. Yes, I have.

Q. How recently was that?

A. As recently as today.

Q. You were then familiar with the policies expressed in such guidelines, that is the 1972 guidelines, concerning the matter of disability insurance coverage and so-called pregnancy and childbirth disabilities?

A. Yes.

Q. Now, in 1966 when the policy formulated in the letter we have here was taking place, was there any discussion within the Commission of a policy such as appears in the 1972 guidelines?

A. I would say yes, Mr. Strauss, to the best of my recollection.

As I indicated earlier, the Commission policy [567] on this point was extensively considered, various alternatives for treating this problem, how do you handle maternity leave, various alternatives were discussed.

One of the alternatives that was discussed was, necessarily, would have been to treat it as an illness-induced absence. So that was discussed, yes.

Q. And rejected?

A. Well, the Commission's policy was as these letters state.

Q. So that this may be clear, may have been evident, but I presume then that when the so-called 1972 policy was dis-

cussed in connection with the 1966 formulation the presence or absence of legislative history was also discussed at the same time?

A. I am sure it was. I don't specifically remember that.

* * * * *

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-640

DWIGHT GEDULDIG, *Appellant,*

VS.

CAROLYN AIELLO, individually and on behalf of all others similarly situated, *Appellees.*

DWIGHT GEDULDIG, *Appellant,*

VS.

AUGUSTINA D. ARMENDARIZ, *et al.*, individually and on behalf of all other women similarly situated, *Appellees.*

Consolidated Cases on Appeal from the United States District Court for the Northern District of California

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BRIEF FOR APPELLEES

OPINIONS BELOW

The opinion of the Three-Judge Court for the Northern District of California is reported *sub nom.*

Aiello v. Hansen at 359 F.Supp. 792 (N.D.Cal. 1973). The Court's order denying reconsideration is unreported, but is included in the Appendix at pp. A-54-55.

JURISDICTION

Jurisdiction of the District Court was invoked under 42 U.S.C. §1983 and 28 U.S.C. §1343(3).

The judgment of the Three-Judge Court for the Northern District of California was entered on June 15, 1973. The Court's order denying rehearing was filed on August 7, 1973. Appellant's Notice of Appeal was filed on August 13, 1973. Jurisdiction of this Court was invoked pursuant to 28 U.S.C. §§1253 and 2101(b).

THE STATUTES INVOLVED

Section 2626 of the California Unemployment Insurance Code provided at the time judgment was entered herein:

> "Disability" or "disabled" includes both mental or physical illness and mental or physical injury. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work. In no case shall the term "disability" or "disabled" include any injury or illness caused by or arising in connection with

pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter.

Effective January 1, 1974, §2626 has been amended and a new §2626.2 has been added (Stats. 1973, c. 1026):

"Disability" or "disabled" includes both mental or physical illness, mental or physical injury, and, to the extent specified in Section 2626.2, pregnancy. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work.

[Section 2626.2] Benefits relating to pregnancy shall be paid under this part only in accordance with the following:

(a) Disability benefits shall be paid upon a doctor's certification that the claimant is disabled because of an abnormal and involuntary complication of pregnancy, including but not limited to: puerperal infection, eclampsia, caesarian section delivery, ectopic pregnancy, and toxemia.

(b) Disability benefits shall be paid upon a doctor's certification that a condition possibly arising out of pregnancy would disable the claimant without regard to the pregnancy, including but not limited to: anemia, diabetes, embolism, heart disease, hypertension, phlebitis, phlebothrombosis, pyelonephritis, thrombophlebitis, vaginitis, varicose veins, and venous thrombosis.

Unemployment Insurance Code §2601 states the legislative objective of California's comprehensive temporary disability insurance program:

> The purpose of this part is to compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury and to reduce to a minimum the suffering caused by unemployment resulting therefrom. This part shall be construed liberally in aid of its declared purpose to mitigate the evils and burdens which fall on the unemployed and disabled worker and his family.

QUESTION PRESENTED

Whether a statute denying temporary disability insurance benefits to an otherwise qualified applicant therefor, on the sole ground that the applicant's illness or injury is related to or caused by pregnancy or childbirth, violates the equal protection clause of the Fourteenth Amendment to the United States Constitution, where the statute is part of a comprehensive state disability insurance scheme providing such benefits to individuals disabled for virtually any other reason.

STATEMENT OF THE CASE

I.

HISTORY OF THE CASE

Appellees filed these actions on behalf of themselves and all other women "who, but for the fact that their disability is due to illness or injury caused by or arising in connection with pregnancy, are or would be eligible to receive disability insurance benefits from the

state of California." (Para. V, Consolidated Complaint, Appendix at 4.)[1]

Appellees challenged the constitutionality of §2626 of the California Unemployment Insurance Code insofar as the State's comprehensive disability insurance program singled out and excluded from coverage any illness or injury arising out of or in connection with pregnancy. The statute was alleged to deny women the equal protection of the laws guaranteed by the United States (Amend. XIV) and California (Art. I, Secs. 11 and 21) Constitutions and to discriminate against women in their terms of employment, contrary to Article XX, Section 18 of the California Constitution. Appellees sought a declaration that the challenged provision was unconstitutional and injunctive relief against further enforcement of the disqualifying provision. A Three-Judge Court was therefore convened, pursuant to 28 U.S.C. §§2281 and 2284.

The United Automobile, Agricultural, Implement and Aerospace Workers of America (UAW); United Brotherhood of Carpenters and Joiners of America,

[1]The action on behalf of Carolyn Aiello and others similarly situated was filed in the United States District Court for the Northern District of California on July 31, 1972. Appellees Armendariz, Johnson, Jaramillo, and San Francisco Waitresses, Cashiers, Food Checkers, Cafeteria, Creamery, Fountain, Dairy Lunch and Bus Girls Union Local No. 38 commenced their action in the Supreme Court of the State of California on August 16, 1972. Appellant removed the case to United States District Court on August 24, 1972.

The *Armendariz* appellees moved to stay proceedings pending state court resolution of their claims under the California Constitution. After this motion was denied, the two actions were ordered consolidated on December 5, 1972. The Consolidated Complaint was filed on December 27, 1972.

AFL-CIO; California State Council of Carpenters; United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO; International Ladies Garment Workers Union, AFL-CIO; Printing Specialties and Paper Products Union District Council No. 2; Social Services Employees Union, Local 535; Alameda County Central Labor Council, AFL-CIO; and Contra Costa County Labor Council, AFL-CIO, petitioned the Court for leave to intervene on behalf of their female members. Leave to intervene was granted on January 30, 1973. Intervenors seek the relief sought by other appellees herein and in addition ask that relief be granted retroactively to December 14, 1969.

Judgment was entered on June 15, 1973, pursuant to F.R.Civ.P. Rule 54(b), holding that the challenged provision denied women the equal protection of the laws guaranteed by the Fourteenth Amendment and enjoining its further enforcement.[2] Appellant's motion for rehearing was denied on August 7, 1973. This appeal followed.

II.

CALIFORNIA'S TEMPORARY DISABILITY INSURANCE PROGRAM STRUCTURE

California is one of five states to supplement its unemployment insurance or workmen's compensation program with a disability insurance program providing benefits to persons unable to perform their custom-

[2]The Court did not reach the independent state grounds asserted by Appellees. Nor did it adjudicate Appellees' prayer for an award of attorneys fees, or their claim for retroactive application of the judgment. Pursuant to Rule 54(b), the issue of attorneys fees and retroactivity remain to be adjudicated.

ary work due to a physical or mental condition not covered by workmen's compensation.[3] The broad outlines of the California program were ably described by the District Court:

> The disability insurance program is wholly supported by employee contributions. At present, employees must contribute one percent of their salary up to a maximum of $85 per year. [Now $90, per Stats. 1973, c. 1026.] *Id.* §§984, 985, 2901. In order to be eligible to receive benefits, previous to the time of his disability an employee must have contributed one percent of a minimum income of $300 during a one year base period. *Id.* §2652. Having satisfied this requirement, an employee is eligible to receive "basic benefits" varying between $25 and $105 per week, depending upon the amount earned during the base period, for a maximum of twenty-six weeks.[3] *Id.* §§2653,

[3]This amount, however, cannot exceed one-half of the total wages paid to the individual during his base period. CALIF. UNEMP. INS. CODE §2653.

[2]Other states with temporary disability insurance programs are Rhode Island (R.I. GEN. LAWS §§28-39-1 to 28-41-32), New Jersey (N.J. REV. STAT. §§43:21-25 to 43:21-56, also §43:21-7), New York (N.Y. LAWS 1949, ch. 600, adding §§200-242 to N.Y. WORKMEN'S COMPENSATION LAW), and Hawaii (HA. REV. STATS. L. 1969, ch. 392). For a summary description of the programs in the first three of these states, see S. Riesenfeld, Temporary Disability Insurance (Hawaii Legislative Reference Bureau, Report No. 1, 1969). The federal railroad program also maintains a disability insurance program. 45 U.S.C. §§351 *et seq.*; see especially §351(k).

"Temporary disability" in all these programs may generally be said to refer to "a period of six months or less during which a worker is temporarily unable to perform his regular or customary work, by reason of a physical or mental condition or accident, not covered by workmen's compensation. Generally, it includes also the first six months of a longer disability." CITIZENS' ADVISORY COUNCIL ON THE STATUS OF WOMEN (DEP'T OF LABOR), REPORT OF THE TASK FORCE ON SOCIAL INSURANCE AND TAXES 8 (1968).

2655. These benefits begin on the eighth day of disability, or, if the person is hospitalized, on the first day of hospitalization. *Id.* §§2627(b), 2802. While hospitalized, an employee is also eligible for a maximum of twenty days. *Id.* §2801. The fund is protected against false claims by the requirement that claims be accompanied by the affidavits of a licensed medical practitioner attesting to the existence of a disability and by the requirement that an employee must submit to such reasonable examinations as the Department may require. *Id.* §§2627(c), (d), 2708, 2710.

359 F.Supp. at 794.

As the District Court went on to point out, the California program covers disability due to virtually any cause, with the exclusive exception of disabilities caused by pregnancy and parturition. 359 F.Supp. at 794.

California has made several important choices in structuring its program. Because Appellant has sought to justify the exclusion of birth-caused disabilities by reference to the alleged operation or purposes of the California program, it is important at the outset to explore the Legislature's intent in enacting the California program, as that intent is reflected in legislative structuring of the program.

The Legislature has stated its basic intent in Section 2601:

> The purpose of this part is to compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury and to reduce to a minimum the suffering caused by unem-

> ployment resulting therefrom. This part shall be construed liberally in aid of its declared purpose to mitigate the evils and burdens which fall on the unemployed and disabled worker and his family.

The Legislature has ensured the "liberal construction" of the program in several important respects, contrary to Appellant's contentions: (1) California has chosen to pool all risks rather than use actuarial principles; (2) California has extended coverage to persons whose present and future connection with the labor force may be very tenuous; (3) California has chosen to pay proportionately greater benefits to lower paid workers; and (4) California has chosen to compensate virtually any disability, regardless of possible voluntariness. These choices, among others, distinguish California's disability insurance program from others, especially from the private employer-financed plans with which Appellant seeks to identify.

A. California has chosen to pool all risks rather than distribute costs or benefits according to actuarial principles.

California could have chosen to tax different classes of employees differently for disability insurance depending on an actuarial evaluation of their morbidity experience, that is, their predicted rate of disability claims. Benefit amounts might also have been classed according to actuarial principles, giving fewer benefits to certain classes of employees who were actuarially determined to represent a large drain on fund resources. Alternatively, California might have allowed a substantial percentage of private employers to substitute their separately financed plans for the state

plan, thereby allowing employers with lower risk employees to insure that class of employees at a lower cost than the cost borne by higher-risk employees insured by the state program.[4] If California had chosen *any* of these alternatives, Appellant could colorably argue that the state uses actuarial principles in its disability insurance program and might therefore use such principles to exclude, on some actuarial basis, pregnancy-caused and parturition-caused disabilities from coverage.[5]

But California has chosen to charge all covered employees at the same rate, regardless of risk, and to ensure that lower risk and higher risk individuals are

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[4]The choice would not be unique. Under New Jersey's program, where employers help finance the plan, employer contributions vary from 35/100 of 1% to 1½% of covered wages depending on the risk experience of its employees. N.J. REV. STAT. §43:21-7(e)(3)(D)(1), (2), (3), (4), (5). New Jersey also allows substantial numbers of employers to opt out of the state fund and insure their own employees. In 1967 only 52.9% of all jobs and 51.3% of all wages were covered by the state plan. N.J. Div. of Employment Security, Annual Report 1966 and 1967, Table 36, reprinted in S. Riesenfeld, *supra* note 3, at 20. New York's program is financed entirely by individual employers and their employees, with privately determined benefit structures predominating. Private plans must provide the "actuarial equivalent" of 60% of a statutory benefit list, as determined by actuarial morbidity tables. See Reg. 41(b)(4) of the N.Y. Workmen's Comp. Bd. Financing of plans in New York obviously depends on the risk experience of any given firm's employees.

[5]In New York's program, employers are given a fairly broad latitude in choosing which disabilities shall be covered. For California to exclude pregnancy-caused and parturition-caused disabilities on the basis of some actuarial principle, it would have to demonstrate not only that it used or permitted the use of actuarial principles in financing the program, but also that it used or permitted the use of such principles in deciding which disabilities to cover. Instead, the voluntary plans which California allows must cover all disabilities covered by the state plan, and cannot result in substantial selection of risks adverse to the disability fund. CAL. UNEMP. INS. CODE §§3254(a), 3254(i).

all members of the same risk pool, thus effectively charging lower risk employees more than actuarial principles might warrant and charging higher risk individuals less. This concept of treating all risks equally leads to the creation of what has been called a "pooled fund."

The pooled fund is created by charging all covered employees at the same rate, regardless of predicted risk, and by limiting private plans. Private plans are limited in part by requiring that all such plans afford benefits *greater* than the state plan (UNEMP. INS. CODE §3254(a)), and, of greater importance, disallowing all voluntary plans which would "result in a substantial selection of risks adverse to the Disability Fund." (UNEMP. INS. CODE §3254(i); *see also* 22 CAL. ADMIN. CODE §3254(i)-2(k)(1)(B).) As of January 1971, only seven percent of covered employees were insured by voluntary plans.[6]

In 1965 the California Assembly's Joint Committee on Unemployment Compensation Disability Insurance made a major study of the operation of the California program. In its Final Report it commented on this aspect of the program's structure:

> Where no employer contribution is required and the employee contribution is on a flat-rate basis, there will be differences in the benefit/income ratio for various groups of employees. Stated

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[6]MILLIMAN & ROBERTSON, INC., ACTUARIAL REPORT OF THE UNEMPLOYMENT COMPENSATION DISABILITY FUND: 1970 (1971) at 21, attached as Exhibit A to Plaintiffs' Points and Authorities in Support of Petition for Writ of Mandate).

> simply, the good risks carry the bad ones; and this is the essence of the *pooled* fund.
>
> In California the modifications of the pooled fund concept lie in self-insurance, and in private insurance as restricted by the adverse selection provision. The latter has some effect in requiring the private carriers to assume a certain proportion of the inferior risks. . . .
>
> The flat-rate contribution principle leads inevitably to the pooled fund, for all practical purposes. Groups of employees, no matter how classified, will vary somewhat from one another in their cost rates. The flat-rate contribution collects more than is needed from some groups of employees in order to pay more to other groups of employees than is contributed by them. The principle, with minor modifications, is deeply embedded in the California system. Its abandonment would require a radical revision of the present financing structure. There appears to be little reason to believe that such a revision is supported by a major proportion of either employers or their employees.[7]

Appellees of course express no opinion regarding the validity of private insurance programs which may or may not charge or determine coverage on the basis of actuarial principles. What is clear is that Appellant may not be heard to argue on the basis of actu-

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[7] California Assembly's Joint Comm. on Unemployment Compensation Disability Insurance, Final Report 27-28 (1966).

arial principles; California simply does not use them, relying instead on a pooled risk system.[8]

B. California has chosen not to tie eligibility for benefits to present or future employment.

California determines eligibility for benefits, once disability has been established, solely on the basis of past contributions to the Disability Insurance Fund. Present or future participation in the labor force has no relationship to eligibility. Indeed, benefits are even payable to the deceased. Unemployment Insurance Code Section 2705 provides in pertinent part:

> Where an individual who would be eligible to receive disability benefits dies before making a claim therefor, the director may in accordance with authorized regulations allow the filing of a claim for such benefits by a person legally entitled thereto. . . .

The Director has issued implementing regulations. 22 CAL. ADMIN. CODE §2705-1.

Of more financial import to the program, benefits are provided for persons who become disabled while they are unemployed, so long as they earned the minimum $300.00 during the applicable twelve month base

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[8]The extent to which California departs from actuarial principles used by many private insurance companies is illustrated by the fact that employees are covered under the California program regardless of any mental or physical condition existing at the time the employee becomes covered under the program. Many private insurance policies exclude coverage of preexisting conditions which later become disabling, on the theory that the risk of disability is too high to insure. California not only insures such risks, but also requires that all voluntary plans cover employees regardless of preexisting mental or physical conditions. 22 CAL. ADMIN. CODE §3254-2(d).

period. The beginning of that base period may antedate disability by as many as 31 months. UNEMP. INS. CODE §§2610, 2611; see also Joint Committee on Unemployment Compensation Disability Insurance, *supra* note 7, at 134.) That California has chosen to grant benefits to the unemployed disabled—regardless of the cause of their unemployment—has more than casual significance because the unemployed disabled make proportionately more claims on the program resources. As a group, the unemployed represent only 6.0% of the covered population, but comprise approximately 14% of all claims and benefits paid.[9] Were the Legislature concerned with limiting benefits to persons

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[9]The California civilian labor force was 8,610,000 in 1970, of whom 519,000, or 6.0%, were unemployed. (Milliman & Robertson, Inc., *supra* note 6, Table 1 of Statistical Handbook.) The unemployed disabled represented approximately 14% of all "first claims" (*id.*, Table 6) and approximately 14% of all benefits paid in that year (*id.*, Tables 9 and 11). While only 11.2% of the employed disabled exhausted their benefit eligibility, and had an average disability duration of 7.6 weeks, 22.4% of the unemployed disabled exhausted their benefits, and the unemployed disabled had an average duration of disability of 10.4 weeks (*id.*). Similarly, the unemployed disabled use a greater proportion of hospital benefits, representing 14% of all hospital benefits paid, due to a greater average claim duration (9.6 days as compared to 7.6 days for the employed disabled) and a greater exhaustion rate (20.2% to 10.1%) (*id.*, Tables 10 and 12). These figures hold true for virtually every year of the program, and were noted at length in the Joint Committee's Final Report in 1966. See Joint Committee on Unemployment Compensation Disability Insurance, *supra* note 7, at 16-19. See also Department of Human Resources Development [HRD], California Disability Insurance Terminated Claims 1970 (June 16, 1971) and 1971 (May 22, 1972), Tables 1-8.

Financing the payment of benefits for the unemployed disabled is accomplished by placing 12% of all state plan contributions, plus an equivalent amount taxed to the few voluntary plans, in a specially designated Unemployed Disabled Account. UNEMP. INS. CODE §§3012(b), 3252(b). Benefits for this group currently cost more than is allocated as a percentage of net con-

whose disability was merely a gap between periods of gainful employment, it surely would have done so by limiting the eligibility for benefits of this relatively costly and readily identifiable group.[10]

The Assembly Joint Committee which studied the program in 1965 was concerned about the high claims rate of the disabled unemployed, and noted the high percentage of such claimants whose earnings were concentrated in one or two quarters of the year. (Joint Committee on Unemployment Compensation Disability Insurance, *supra* note 7, at 36.) The Committee went on to discuss the status of part-time workers, who may be said to be in an intermediate position between the unemployed disabled and full-time permanent workers. The California program did and does contain substantial biases in favor of part-time workers. As the Committee noted, eligibility is conditioned only upon total wages ($300.00) made in the base year,

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tributions. Milliman and Robertson, Inc., *supra* note 6, at Table 15.

For present purposes it may be of interest to note that women, approximately 38.8% of the labor force in 1970 (*id.* at Table 3), accounted for 39.6% of regular state plan payments but only 31.5% of payments to the unemployed disabled. (HRD, California Disability Insurance Terminated Claims 1970, *supra*, Table 2.) In other words, men are overrepresented in the costly category of the unemployed disabled.

[10]Such limitations might have included restricting the eligibility of the unemployed disabled to those also found eligible for unemployment insurance, or by requiring that the disability occur within a short time of leaving covered employment. The New York law, for example, requires the onset of disability to occur within twenty-six weeks following the termination of covered employment. N.Y. WORKMEN'S COMP. LAW, §§207(1) and (2). In California the onset may occur as much as 19 months after leaving such employment. New Jersey conditions the eligibility of the unemployed disabled upon eligibility for unemployment insurance. N.J. REV. STAT. §43:21-4(f)(1).

with no requirement of minimum earnings for a certain number of weeks.[11] The amount of benefits to which one is entitled is not related to average weekly wages over the last year, but rather to the highest amount earned in any one of the four quarters of the base year period, thus substantially favoring the more highly paid part-time worker over the permanent full-time average wage earner.[12] The 1965 Committee recommended that benefits be tied to average weekly wages over the entire 12-month period, in order to favor full-time workers.[13] The Legislature did not agree with the Committee recommendation, and the California program continues to differ from other

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[11]CAL. UNEMP. INS. CODE §2652. New Jersey requires earnings of not less than $15.00 per week for at least 17 weeks. N.J. REV. STAT. §§ 43:21-27(i), 43:21-41(b). Rhode Island requires earnings of $20.00 for each of 20 weeks or $1200 during the base period regardless of weeks worked. R.I. GEN. LAW §28-41-11. Maximum duration of benefits in Rhode Island is 60% of the number of weeks worked or 26 weeks, whichever is less. R.I. GEN. LAWS §28-41-7.

[12]CAL. UNEMP. INS. CODE §2655. Benefits are limited to 50% of all base period earnings, but the disparity between benefits for intermittent and full-time workers is still substantial. For example, a person making $4000 per year with earnings of $1000 in each quarter would be entitled to a maximum of 26 weeks of benefits at $45 per week, for a total of $1170 in benefits. A person making $4000 per year by making $1775 in one quarter and lesser amounts in other quarters would be entitled to 26 weeks of benefits at $76 per week, for total benefits of $1976. Put another way, a person making $2340 in one quarter, who is unemployed the rest of the year, is entitled to the same total benefits as the steady worker making $4000 per year.

Other states base benefits on a weekly average of wages, rather than reward persons with erratic wage earning behavior. *See, e.g.*, N.Y. WORKMEN'S COMP. LAW §§ 201(13), 204(2); N.J. REV. STAT. §§43:21-3(c), 43:21-27(i) and (j); R.I. GEN. LAWS §28-39-2(21).

[13]Joint Committee on Unemployment Compensation Disability Insurance, *supra* note 7, at 39.

state and private programs by favoring persons whose participation in the labor force may be only intermittent.

Benefits are also provided for persons who are known to have a relatively low rate of immediate return to the labor force. Appellant's own Department made a study in 1966 of the subsequent labor force status of persons who exhaust their basic benefits.[14] (Department of Employment Report 1200 No. 12 (1966), reprinted in Joint Committee on Unemployment Compensation Disability Insurance, Final Report, *supra* note 7, at 112-116.) This study found that return to employment is dependent on age, not sex.[15] What is striking, however, is that fewer than half the 9275 exhaustees studied had returned to work within one year after exhausting benefits. Were the Legislature concerned with future labor force participation, it might well have limited the duration of benefits, either absolutely or according to age.

The fact is that the Legislature has not shared Appellant's newly articulated concern that benefits be paid only to individuals who belong to a group whose statistical group behavior indicates an immediate return to work following disability. However relevant

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[14]Exhaustion of benefits occurs at the end of 26 weeks of benefits, or when benefits equal to 50% of the individual's base year total wages have been received. CAL. UNEMP. INS. CODE §2653.

[15]Women returned to work within a year after exhaustion of benefits slightly more frequently than men. Men constituted 60.3% of the group studied, but only 58.9% of those finding employment. Approximately 57% of the exhaustees under age 45 returned to work but fewer than 33% of persons over age 55 did so. *Supra* note 7 at 112-116.

such a concern may be to private employers insuring their own employees, it has no relevance to California's pooled fund program.[16]

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[16]Appellant goes so far as to characterize disability payment made to non-returning individuals as "severance" or "early retirement" pay. Appellant's br. at 21. Appellant confuses the purpose of California's program with possible purposes of private insurance plans. Private employers may institute such a plan not for the altruistic and compensatory reasons behind the California program, but rather as an incentive to employee loyalty and longevity with the particular company. Fringe benefits in private industry may thus serve as a form of wages designed to protect employer investment in employee training and experience as a component of productivity and therefore profits. Thus Amicus Curiae General Electric Company, in its 1956 Annual Report, stated:

> General Electric's emphasis on the worthwhile personal satisfactions of its employees carries into the Company's attitude toward the compensation of employees in exchange for their interest, initiative, skill, care, effort and teamwork. Compensation at General Electric is interpreted broadly to include not only monetary returns but also the value of benefit programs. . . .
>
> (*Id.* at p. 12)

In its 1957 Annual Report, General Electric emphasized its benefit programs as an incentive to employee loyalty:

> General Electric's employee benefit plans are particularly effective in helping to attract top-quality people at all levels and encouraging them to make their careers with the Company.
>
> (*Id.* at p. 18)

See also D. ALLEN, FRINGE BENEFITS: WAGES OR SOCIAL OBLIGATION (Rev. Ed. 1969).

If the disabled employee does not return to employer X, X has lost his investment in worker experience, whether or not the employee remains in the labor force at some other job. The employer's risk of loss is external to his system, and each employer has that same risk.

The California program involves none of these problems. The employer invests nothing in the program and has no call upon it. The State has no programmatic interest in the future employment of covered workers. Even if it did, for reasons beyond Appellees' comprehension, that purpose would be served by eventual return to the labor force in some occupation, including part-time work, and would not be frustrated by a one- to three-year break in labor force participation. In short, whatever the rational

C. California has chosen to pay proportionately greater benefits to lower paid workers.

California's disability insurance program, like many insurance programs, relates benefit amounts to the individual employee's contributions to the fund. The relationship between contributions and benefits, however, is neither direct nor proportional. First, as previously noted (*supra,* p. 16)), benefit amounts are based on the highest earnings (and hence, contributions to the fund) in any one of the four quarters of the base year period. Employees with fewer earnings (and contributions) can thus get more in benefits from the fund than others, so long as their earnings are concentrated in one quarter of the year.[17]

Of even greater importance, the percentage of *weekly* wage loss replacement is set much higher for lower paid workers, thus creating a progressive benefit structure designed to pay lower paid workers proportionately *more* as a class than they contribute. Thus the full-time year round employee making $50 per week is eligible for $31 per week in benefits, or re-

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basis of private employer concerns regarding immediate return to the labor force, the validity of which is not at issue here (*cf.* Stanley v. Illinois, 405 U.S. 645 (1972)), California has no such basis. What may be "severance" pay to the private employer is still simply a paid-for insurance benefit in California's employee-financed program.

[17]For the steady worker who exhausts his 26 weeks of benefits, total benefits replace no more than approximately 33% of total wages. *E.g.*, the employee making $600 per quarter, or $2400 per year, is entitled to weekly benefits of $29, or total maximum benefits of $754, which is equal to approximately 31.5% of total wages. An employee making the same total per year, concentrated all in one quarter, would be entitled to $101 per week for 11.8 weeks, for total benefits of $1200, or 50% of total yearly wages.

placement of 62% of weekly wage loss. The $100 per week employee gets $57 weekly, or a 57% replacement. The $200 per week employee gets $105 weekly, or a 50.25% replacement, and workers making more than $200 per week also get $105 per week, for less than 50% replacement of weekly wage loss.

Therefore, although California may be entitled to tie benefit amounts to individual contributions, *Shapiro v. Thompson,* 394 U.S. 618, 633, n.10 (1969) it has chosen to ensure that *any* class of workers which earns less than the average wage will be paid proportionately more in benefits than they contribute to the fund.[18]

D. California has chosen to extend coverage to virtually any disabling condition.

In furtherance of its stated intent to "mitigate the evils and burdens which fall on the unemployed and disabled worker and his family" (UNEMP. INS. CODE §2601), California has chosen to compensate work loss for virtually any reason. The legislation speaks in terms of "illness or injury" as well as terms of "physical or mental condition," and it is presumed that benefits are paid in conformity with legislative intent. Appellant's workaday administration of the program

[18]This choice has been a conscious one. In 1966 the Assembly's Joint Committee recommended that benefits be changed to favor fulltime, better paid workers. The Committee recommended that wage loss replacement be highest for workers with earnings of $6500 per year, and only two thirds as much for workers at the bottom rung of eligibility. See Joint Committee on Unemployment Compensation Disability Insurance, *supra* note 7, at 38-41. The Legislature refused to change the current structure, preferring to subsidize more poorly paid workers.

reveals that the Legislature's mandate to construe the disability legislation "liberally in aid of its declared purposes" has been carried out. Benefits are paid upon certification of disability by the attending physician, dentist, or podiatrist (UNEMP. INS. CODE §§2708, 2710), regardless of the voluntariness, predictability, uniqueness, or "normalcy" of the disability. Many of the conditions compensated are not thought of as injuries or illness in lay terms.

Compensation is provided, for example, for disabilities caused by cosmetic plastic surgery, usually thought to be a voluntarily created disability. Compensation is provided for disability caused by an auto accident resulting from the disabled's drunk driving.[19] Disabilities resulting from voluntary sterilizations are compensable, as are disabilities resulting from barroom brawls initiated by the disabled. Obesity, which may result from voluntary action, is similarly compensable when it disables a worker from performing his or her customary or regular work. Disability resulting from a sex-change operation is also compensable.

It may of course be argued in the individual case that the cause of any of these "voluntary" disabilities

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[19]This Court has ruled that alcoholism per se is not so involuntary a condition as to allow an individual to escape prosecution for public drunkenness. Powell v. Texas, 392 U.S. 514 (1968). Although the majority and dissenters disagreed in *Powell* as to the voluntariness of alcoholism itself, there was unanimous agreement that drunk driving should still be considered sufficiently voluntary to subject the intoxicated driver to criminal sanctions. 392 U.S. 514, 534, 559. As the dissent commented, the additional behavior of driving requires "independent acts or conduct and does not typically flow from and [is] not part of the syndrome of . . . alcoholism." 392 U.S. 514, 559 at n. 2.

is not a "voluntary" act on the part of the disabled but rather stems from psychological "compulsions" or other mental illness. The program makes no such distinctions in assessing eligibility for benefits. Appellant may thus in a common sense way be said to compensate many disabilities resulting from voluntary action.

Similarly, the California program compensates disabilities without regard to their predictability. Many private insurance policies exclude coverage for disabilities caused by mental or physical conditions already existing at the time coverage begins, but California compensates all such disabilities. (See discussion, *supra* note 8; 22 CAL. ADMIN. CODE §3254-2(d).) Thus an individual with degenerative arthritis, who will almost certainly become disabled for many types of employment, is eligible for benefits after earning the required minimum. Similarly, cataract operations and prostatectomies, which may be planned long in advance are compensable under California's program regardless of the employee's advance knowledge of the approaching disability and regardless of its certain occurrence at the time of coverage. *See Green v. Waterford Board of Educ.*, 473 F.2d 629 (2d Cir. 1973). California's choice in this regard has been deliberate, as its express requirement that pre-existing conditions be covered by voluntary plans (22 CAL. ADMIN. CODE §3254-2(d)) demonstrates. California's decision to include pre-existing and pre-planned disabilities once again reflects the Legislature's broad interpretation of the pooled fund concept of disability insurance and its

singular legislative purpose of compensating individuals and their families for lost wages regardless of the nature or cause of the disabling event.

It may also be noted that California regularly compensates disabilities regardless of their concentration in or uniqueness to a given class of covered workers. Hemophilia, prostatectomies, and other disabilities unique to males, as well as hernias, which are concentrated in the male population, are all compensated. Sickle cell anemia, which is practically unique to blacks, is similarly compensated. Heart attacks and other disabilities concentrated among older workers are also compensated. The pooled fund concept is inconsistent with any other treatment of disabling conditions, regardless of incidence among various groups in the California population.

Finally, it comes as no surprise that California has not chosen to treat disabilities differently by any classification labeled "normal" and "abnormal." The statistical or other "normalcy" of one's disability has nothing to do with eligibility in the California program. Whether it is "normal" to have two colds per year or 2.1 children per family, or whether the state of pregnancy or parturition is "normal" in a statistical or medical sense would present grave problems for the California program as presently structured, since its only concern is whether a particular condition is disabling or not.[20] Benefits are paid for disabilities

[20]The concept of "normalcy" is probably even less universally and objectively definable than the concept of "voluntariness" discussed above. As applied to most disabilities, however, the best that can be said is that the word "normal" is used to denote

caused by such commonplace and non-dangerous conditions as removal of irritating wisdom teeth, other orthodonture, and recovery from hair transplants used to disguise natural baldness. The "normalcy" of a disability is not relevant in any sense, any more than voluntariness, predictability, or uniqueness to eligibility for benefits in the California disability insurance program.

SUMMARY OF THE ARGUMENT

California excludes only one type of disability from its comprehensive state disability insurance program —disabilities caused by "normal" childbirth. Such disabilities arise from pregnancy, a physical process unique to women. Classifications based upon physical characteristics unique to one sex are sex-based classifications. Sex unique characteristics, particularly the capacity to become pregnant, are what define a person as a man or a woman, and the legal benefits or burdens which are based on such characteristics are burdens or benefits conferred because of a person's gender-identity. As with other types of sex discrimination, discrimination on the basis of pregnancy often results from gross stereotypes and generalizations which prove irrational under scrutiny. Most

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statistically prevalent conjunctions of traits. *Cf.* E. NAGEL, THE STRUCTURE OF SCIENCE: PROBLEMS IN THE LOGIC OF SCIENTIFIC EXPLANATION, 49-52, 56-73 (1961). See also Murphy, *A Scientific Viewpoint on Normalcy*, 9 PERSPECTIVES IN BIOLOGY AND MEDICINE 333 (Spring 1966). To say that pregnancy or childbirth are "normal" states or processes ignores the substantial injury and risk to female organs and tissues that occurs during parturition as well as the infrequency with which any individual is found in that state.

laws which classify on the basis of pregnancy affect women in areas where they are in competition for jobs or job-related benefits such as sick leave or disability benefits. Whether differential treatment on the basis of pregnancy is justified must depend upon the purpose of legislation and whether the differences between that "unique" characteristic and other characteristics are relevant to that purpose.

Appellees contend that the proper standard of review in this case is strict scrutiny, first, because sex-based classifications meet all the traditional criteria for "suspectness" and second, because the challenged exclusion burdens the exercise of the fundamental right to choose to bear a child. However, under either the strict scrutiny standard advocated by Appellees, or the scrutiny standard required in sex discrimination cases by *Reed v. Reed,* 404 U.S. 71 (1971), the statutory exclusion of pregnancy- and parturition-caused disabilities from the state disability insurance program is unconstitutional.

The California program is a pooled risk fund. No risk is excluded because it is higher than others, nor does the contribution rate vary according to the degree of risk posed by certain classes (the older worker, the low wage earner). Since actuarial principles are eschewed in favor of the pooled risk system, actuarial data cannot selectively be used by the state as a justification for excluding pregnancy- and parturition-related disabilities.

Moreover, while pregnancy itself is *not* a disability, disabilities *caused* by pregnancy and childbirth are

similar to disabilities now compensated in all relevant respects. It is common medical knowledge that virtually the entire reproductive tract of a woman is injured to some extent during childbirth. While the extent and severity of the disability varies, virtually all women suffer from disabling injuries for some period of time during labor, delivery and the puerperium.

Appellant seeks to justify the exclusion on the ground that pregnancy-related disabilities are voluntary. Yet, to the extent that pregnancy-related disabilities can be said to be voluntary, so can other disabilities currently compensated by the disability fund, such as the disabilities which result from cosmetic surgery or sex-change operations.

Appellant contends that because almost half of the working women who give birth do not return to the labor force immediately after delivery, the state is justified in excluding their disability from coverage. But the program covers all disabilities without regard to the disabled individual's present or likely future attachment to the labor force or a particular job. And, in any event, Appellant may not exclude all birth-caused disabilities from coverage on the basis of a sex stereotype admittedly inapplicable to over half the class thereby excluded.

The administrative convenience of excluding all disabilities caused by pregnancy and childbirth on the ground that women and their doctors will defraud the program cannot justify their exclusion from coverage. The program already has built-in safeguards against fraudulent claims and, while physicians may initially

need guidelines on eligibility for benefits, there is no reason to believe they will intentionally thwart the goals of the disability program. In any event, even if it were proven that some women would purposely make false claims and some doctors would intentionally disregard guidelines, the resultant exclusion of all claims, all of which have *some* validity, is arbitrary.

Appellant contends that women already benefit disproportionately from the fund and that this alleged benefit differential justifies continued exclusion of pregnancy- and birth-related disabilities. However, since the state has chosen a pooled risk rather than an actuarial-based program, it cannot resort to actuarial considerations to justify its refusal to pay benefits for a disability unique to women. In any event, income and age, rather than sex, are the significant variables in predicting disability experience. Women receive benefits disproportionate to their contributions to the fund *only* because they are low wage earners and the program is structured disproportionately to benefit such workers.

Moreover, Appellant exaggerates the cost of extending coverage to disabilities caused by pregnancy and parturition. Appellant's estimate of a cost of $120.2 million is based on false assumptions as to the frequency and duration of disabilities caused by childbirth and failure to eliminate costs not related to those particular disabilities. Appellees estimate the cost to be $48.9 million, rather than the $120.2 million estimated by Appellant.

Finally, whether the cost of providing the incremental coverage is $48.9 million or two and a half times that amount, Appellant cannot justify his otherwise irrational classification on the ground of cost alone. If California wishes to limit the costs of its employee-financed program it may do so by excluding or limiting all claims in excess of certain amounts, or by any other constitutional means, but it may not economize at the expense of women disabled by pregnancy- and birth-related disabilities when their disabilities are not distinguishable from those already covered by the program.

ARGUMENT

I

CLASSIFICATIONS BASED UPON PHYSICAL CHARACTERISTICS UNIQUE TO ONE SEX ARE SEX-BASED CLASSIFICATIONS

Perhaps no issue in the emerging law of sex discrimination has greater ramifications for women than does the question whether laws treating a physical characteristic unique to one sex create classifications based on sex. Its resolution in the context of the equal protection clause will almost certainly affect the interpretation of Title VII of the Civil Rights Act of 1964, Executive Order 11246 and, if ratified, the Equal Rights Amendment.[21] At the same time, no issue has presented more thorny conceptual problems for courts

[21]Guidelines issued pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* which prohibits employment discrimination on the basis of race, religion, national origin and

deciding challenges to laws on the ground that they discriminate on the basis of sex.[22] Typical of the con-

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sex, provide that: "Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom, are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment." 29 C.F.R. §1604.10. Proposed sex discrimination guidelines issued by the Department of Labor pursuant to Executive Order 11246 which prohibit sex discrimination by government contractors contain a pregnancy provision virtually identical to the EEOC's pregnancy guideline. Proposed §60-20(h)(2), 41 C.F.R. published in 38 Fed. Reg. 35336, 35338 (Dec. 27, 1973). See also Department of Health, Education and Welfare, Higher Education Guidelines, 37 Fed. Reg. 24686 (1972).

[22] *Compare, e.g.*, Buckley v. Coyle Public School System, 476 F.2d 92, 95-97 (10th Cir. 1973); Green v. Waterford Board of Educ., 473 F.2d 629, 634-36 (2d Cir. 1973); Seaman v. Spring Lake Park Independent School Dist., 363 F.Supp. 944 (D. Minn. 1973); Heath v. Westerville Board of Educ., 345 F.Supp. 501, 507 (S.D. Ohio 1972); Bravo v. Board of Educ., 345 F.Supp. 155, 157-59 (N.D. Ill. 1972); Williams v. San Francisco Unified School Dist., 340 F.Supp. 438, 443 (N.D.Cal. 1972); Struck v. Secretary of Defense, 460 F.2d 1372, 1378 (9th Cir. 1972), *cert. granted*, 409 U.S. 947 (1972), *judgment vacated and case remanded for determination of mootness*, 409 U.S. 1071 (1972), dissenting opinion of Duniway, J.; Robinson v. Rand, 340 F.Supp. 37 (D. Colo. 1972); Pocklington v. Duvall County School Board, 345 F. Supp. 163, 164 (N.D.Fla. 1972) *with* Shattman v. Texas Employment Comm., 459 F.2d 32 (5th Cir. 1972), *cert. den.*, 409 U.S. 1107, *reh. den.*, 410 U.S. 959 (1973); Paxman v. Wilkerson, ___ F.Supp. ___, 5 F.E.P. Cases 675 (E.D.Va. 1973); Gutierrez v. Laird, 346 F.Supp. 289, 292 (D.D.C. 1972); Godwin v. Patterson, 363 F.Supp. 238, 240-41 (M.D.Ala. 1973); Miller v. Industrial Comm'n., 173 Col. 476, 480 P.2d 565 (1971). *See also* Newmon v. Delta Air Lines, Inc., ___ F.Supp. ___, 5 E.P.D. ¶8533 (N.D. Ga. 1972); *aff'd* 475 F.2d 768 (1973), BNA, Daily Labor Report, Jan. 25, 1974 (final order); Vick v. Texas Employment Commission, ___ F.Supp. ___, 6 E.P.D. ¶8932 (S.D. Texas 1973); Wetzel v. Liberty Mutual Ins. Co., ___ F.Supp. ___, 7 E.P.D. ¶9097 (W.D.Pa. 1974); EEOC Decision 70-360, CCH EEOC Decisions ¶6084 (1969); EEOC Decision 71-308, CCH EEOC Decisions ¶6170 (1970); EEOC Decision 72-0372, CCH EEOC Decisions ¶6412 (1971); EEOC Decision 72-1919, CCH EEOC Decisions ¶6370 (1972); EEOC Decision 73-0479, CCH EEOC Decisions ¶6381 (1973); EEOC Decision 23-0520, CCH EEOC Decisions ¶6389 (1973) (which treat the pregnancy issue under Title VII of the Civil Rights Act of 1964).

ceptual loggerheads at which courts find themselves are the majority and dissenting positions in *Cohen v. Chesterfield County School Board,* 474 F.2d 395 (4th Cir. 1972), rev'd ___ U.S. ___, 42 U.S.L.W. 4186 (1974),[23] (in which a school teacher challenged a regulation requiring her to take an unpaid leave of absence after her fifth month of pregnancy).

In the Fourth Circuit's *Cohen* decision, Chief Judge Haynsworth, writing for the majority, asserts that because such classifications are based upon a unique physical characteristic they *cannot* be sex-based:

> "Only women become pregnant; only women become mothers. But Mrs. Cohen's leap from those physical facts to the conclusion that any regulation of pregnancy and maternity is an invidious classification by sex is merely simplistic. The fact that only women experience pregnancy and motherhood removes all possibility of competition between the sexes in this area. No man-made law or regulation excludes males from those experiences, and no such laws or regulations can relieve females from all of the burdens which naturally accompany the joys and blessings of motherhood."
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> 474 F.2d 395, 397.

Judge Winter, dissenting, concludes that because such classifications are based on a unique physical characteristic, they are *necessarily* sex-based:

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[23]This Court struck down the mandatory maternity leave provision on due process grounds and therefore did not reach the question of the treatment of physical characteristics unique to the sexes under the equal protection clause of the Fourteenth Amendment.

"'The distinguishing factor seems to be motherhood versus fatherhood. The question then arises: Is this sex-related? To the simple query the answer is just as simple: Nobody—and this includes Judges, Solomonic or life-tenured—has yet seen a male mother. A mother, to oversimplify the simplest biology, must then be a woman.' . . . 'Female employees are the only employees . . . who become pregnant; it follows that they are provisionally dismissed from work on account of their sex.'"

474 F.2d 395, 401.

Taken one step further, the conceptual difficulties suggested by the majority and dissenting opinions in *Cohen* prove illusory. The individual who receives a benefit or suffers a detriment because of a physical characteristic unique to one sex benefits or suffers because he or she belongs to one or the other sex. Sex-unique physical characteristics are precisely what define a man or woman as a member of one class or the other.[34] These definitional characteristics have historically been the source and justification for the often unwarranted differential treatment of men and women. Whether differential treatment on the basis

[34]Judge Weber, in Wetzel v. Liberty Mutual Ins. Co., ___ F. Supp. ___, 7 E.P.D. ¶9097 (W.D.Pa. 1974), a Title VII action, treats this question more humorously but perhaps no less insightfully: "As a point of departure in considering the merits of Plaintiffs' charges of sex discrimination with respect to Defendant's maternity leave and pregnancy disability income protection policies it might appear to the lay mind that we are treading on the brink of a precipice of absurdity. Perhaps the admonition of Professor Thomas Reed Powell to his law students is apt: 'If you can think of something which is inextricably related to some other thing and not think of the other thing, you have a legal mind'." (___ F.Supp. ___, 7 E.P.D. at 6613.)

of such physical characteristics is justified must depend upon the purpose for which the classification was created and upon whether the "uniqueness" of the physical characteristic is relevant to that purpose.

Judge Haynsworth's observation that "the fact that only women experience pregnancy and motherhood removes all possibility of competition in this area" is accurate *only* where a statute is narrowly drawn and the congruence between the classification and the purpose is virtually perfect, as, for example, a rule which granted a leave of absence from work for nursing mothers. Most laws which single pregnant women out for different treatment are not so finely tailored and do affect them in an area where they compete.[25]

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[25]Although other sex-unique characteristics of men and women are occasional bases of legislation (e.g., rape laws, regulation of beards), the physical characteristic which is most pervasively used to differentiate the legal status of men and women is the capacity of women to become pregnant. *See generally*, Hillman, *Sex and Employment under the Equal Rights Amendment*, 67 Nw.U.L. Rev. 789, 797-809 (1973). Because virtually all women can become pregnant, and because approximately 84 percent of married women do so at least once (U.S. Dep't of Commerce, Bureau of the Census, Census of Population 1970, Detailed Characteristics, P.C.(1)-D1-US Summary Table 212, at 41 (1971)), government and private policies or practices regarding pregnancy affect most women within their reach. In contrast, policies and practices concerning beards and laws punishing rape limit or affect a relatively small percentage of men. Therefore, the question of the legal treatment of sex-unique physical characteristics is best illuminated by focusing on pregnancy.

For a comprehensive discussion of the rape laws and sex equality see Brown, *et al*, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L.J. 871, 954-961(1971). For an attempt to articulate a rationale for a lesser standard in the treatment of beards, male hair length and other dress and appearance issues under Title VII of the Civil Rights Act of 1964, see Note, *Employer Dress and Appearance Codes and Title VII of the Civil Rights Act of 1964*, 46 So.Cal. L.Rev. 965, 983-985, 990, 996 (1973). The author summarizes

For example, the service woman who is discharged because she becomes pregnant is in competition for a job. To the extent that her discharge occurs while she is still as fit and able to perform as those persons who are not discharged (and most women remain fit for most jobs throughout their pregnancy),[26] her pregnancy constitutes a distinction without a difference. To the extent her discharge is justified by the fact that she will be disabled for a period of time while in labor, delivery and recovery therefrom, she is in competition for whatever medical benefits, disability benefits or disability leave are available to others who are also temporarily disabled. For purposes of a benefit or leave provision, her disability is no more "unique" than any other: like other disabilities, hers has its own distinctive causes, durations, physical manifestations and cures. Like some other causes of disability, hers may result from a voluntary act (*e.g.*, cosmetic surgery, attempted suicide, obesity, sex-change operation), like others, it may result from a characteristic unique to one sex (*e.g.*, prostatectomies,

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his argument as follows: "Dress and appearance codes could be distinguished on two grounds from the other contexts in which sex plus has been rejected. First, the nature of the stereotyping with dress and appearance is different since it does not involve a sex-based perception of an individual's occupational capabilities. Second, in the context of grooming regulations, which are exclusionary, accommodation is possible since dress and appearance are alterable characteristics not involving a significant status or condition." (*Id.* at 990.) The author gives, as examples of a "significant status or condition", "having children" or "being married". (*Id.* at 996.)

[26] *See, e.g.*, Affidavits of: George C. Calderwood, Appendix p. 37; Dr. Phillip J. Goldstein, Appendix p. 38; Dr. N. R. Trueblood, Appendix p. 40; Dr. Andre Eugene Hellegers, Appendix p. 43; Dr. Elizabeth A. Crisp, Appendix p. 45.

circumcisions). Like still others, it may result from a "normal" condition (*e.g.*, removal of wisdom teeth, orthodonture, hair transplants).

The pregnant woman's competitive position is clear when men are not discharged and in fact receive leave or medical benefits for disabilities unique to their gender, but women do not. Thus, the sex-based nature of the discrimination emerges: men as a class are compensated for all disabilities which they suffer; women as a class are not compensated for all of theirs. In such a system, the class of women as a whole are disadvantaged because of their sex.

At the root of recent judicial decisions and anti-discrimination legislation, such as Title VII of the Civil Rights Act, is the principle that different benefits and burdens should not be imposed on an individual solely because that individual is of one sex or the other. *See, e.g., Frontiero v. Richardson,* 411 U.S. 677 (1973); *Reed v. Reed,* 404 U.S. 71, 75 (1971). The plurality's rationale for treating sex-based classifications as suspect in *Frontiero* provides a framework for considering why, *whatever standard of constitutionality is applied,* discrimination because of unique physical characteristics should be subjected to the same scrutiny as other sex-based classifications. In reaching the conclusion that sex should be treated as suspect, the Court looked at the historical rationales for discrimination and concluded that sex discrimination was often based on gross stereotypical distinctions between the sexes. The effect of such stereotyping was to relegate women to a second class

citizenship without regard to their individual capacities. *Frontiero,* 411 U.S. 677, 687. *Compare Reed v. Reed,* 404 U.S. 71 (1971) *with Reed v. Reed,* 93 Idaho 511, 465 P.2d 638 (1970).

At the core of the historical discrimination against women are what were then considered to be the "unique" differences between men and women, particularly pregnancy and the maternal role long considered inseparable from it. *Cf. Bradwell v. Illinois,* 83 U.S. (16 Wall.) 130, 141 (1873). Thus, in *Muller v. Oregon,* 208 U.S. 412 (1908), the court declared:

> Differentiated by [her physical structure, the performance of maternal functions and her dependency on men] from the other sex, she is properly placed in a class by herself. . . .
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> 208 U.S. 412, 422.

Placed in a "class by herself" because of characteristics considered unique to women, she was cast outside the reach of the principle of equality for most purposes until recently. For, as Justice Frankfurter stated in holding that women could be excluded from the occupation of bartender, "[T]he Constitution does not require situations 'which are different in fact or opinion to be treated in law as though they were the same.'" *Goesaert v. Cleary,* 335 U.S. 464, 466 (1948).

The sweeping generalization that women are "different," which justified all the legal disabilities under which they labored for centuries, has been progressively narrowed under scrutiny of the relevance of supposed differences to the purposes of legislation. In 1908, the Court was able to conclude: "That woman's

physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious" (208 U.S. 412, 421). Today, it has become apparent that if women are at a disadvantage in the struggle for subsistence it is in large part because of human rather than natural laws. As a result, many of those laws have been struck down as violating the equal protection clause.[27] We have arrived, after this narrowing process, at those differences between men and women still considered "real" in fact and opinion: the sex-unique characteristics of men and women.

Those who would make these unique physical differences a touchstone for unscrutinized differential treatment offer nothing other than the modern version of the historical rationales which were for so long the source of women's second class citizenship under the law. Statements such as Judge Haynsworth's that "no man made law or regulation . . . can relieve females

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[27]Reed v. Reed, 404 U.S. 71 (1971) (discrimination against women in appointment to administrator of estate); Brenden v. Independent School Dist. 742, 477 F.2d 1292 (8th Cir. 1973) (exclusion of females from high school sports programs); Eslinger v. Thomas, 476 F.2d 225 (4th Cir. 1972) (excluding females as legislative pages); Bennett v. Dyer's Chop House, Inc., 350 F. Supp. 153 (N.D. Ohio 1972) (exclusion of females from restaurant service); Kirstein v. Rector and Visitors of University of Virginia, 309 F.Supp. 184 (E.D.Va. 1970) (exclusion of women from state institution of higher education); Seidenberg v. McSorley's Old Ale House, Inc., 317 F.Supp. 593 (S.D.N.Y. 1970) (exclusion of females from service at ale house); Karczewski v. Baltimore & O.R. Co., 274 F.Supp. 169 (D.C.Ill. 1967) (exclusion of widows from coverage for loss of consortium; White v. Crook, 251 F.Supp. 401 (M.D.Ala. 1966) (exclusion of women from juries); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (exclusion of women from employment as bartenders).

from all the burdens which naturally accompany the joys and blessings of motherhood" (474 F.2d 395, 397) are reminiscent of the earlier manifestos of a dual system of law for men and women.[28] Significantly, and not surprisingly, the rule which was necessarily sustained under Judge Haynsworth's rationale was subsequently struck down as arbitrary by this Court. *Cleveland Board of Education v. LaFleur*, ___ U.S. ___, 42 U.S.L.W. 4186 (1974).

Placed in historical context, it should be apparent that discrimination on the basis of pregnancy, a "unique" characteristic, is not separable from previous sex discrimination, but rather part of a continuum of discrimination. For practical purposes there is no difference between refusing to permit women to become lawyers because of their physical

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[28]Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (concurring opinion) ("[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman."); Muller v. Oregon, 208 U.S. 412, 422 (1908) ("The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her."); Quong Wing v. Kirkendall, 223 U.S. 59 (1912); Riley v. Mass., 232 U.S. 671 (1914); Miller v. Wilson, 236 U.S. 373 (1915); Radice v. New York, 264 U.S. 292 (1924); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Goesaert v. Cleary, 335 U.S. 464 (1948); Hoyt v. Florida, 368 U.S. 57, 61-62 (1961) ("Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life.").

and emotional differences from men[29] and refusing women certain jobs on the more narrow ground that they might become pregnant[30] or firing them because they are pregnant. The issue for courts is not whether pregnancy is, in the abstract, sui generis, but whether the legal treatment of pregnancy in various contexts is justified or invidious.

The "gross, stereotypical distinctions between the sexes," which Justice Brennan notes in *Frontiero* (411 U.S. 677, 685) flow from notions about women such as those described above, are at the root of many laws and regulations relating to pregnancy. To name just a few: the medically unsupported assumption that women's ability to function is impaired during the latter stages of pregnancy is asserted to justify mandatory maternity leaves; the assumption that she remains unable to work for long periods of time after giving birth is used to prevent her return;[31] the law which required the discharge from the military of all service women who became pregnant appeared premised on the belief that a woman's primary function is childbearing and rearing and that career interests should not be allowed to compete with

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[29] *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873); *cf.* In re Lockwood, 154 U.S. 115 (1894).

[30] *See* Cheatwood v. South Cent. Bell Tel.&Tel. Co., 303 F.Supp. 754, 759-760 (M.D.Ala. 1969).

[31] *See* Cohen v. Chesterfield County School Board, 474 F.2d 395 (4th Cir. 1972), *rev'd.* ___ U.S. ___, 42 U.S.L.W. 4186 (1974), and LaFleur v. Cleveland Board of Education, 465 F.2d 1184 (6th Cir. 1972), *aff'd* ___ U.S. ___, 42 U.S.L.W. 4186 (1974). *See also*, Gross, *Liberty, Equality—Maternity!*, 2 CLAIMS ACTION REPORTS No. 2, at 30 (1973).

that function.[32] The assumption that pregnant women required by employers to leave their jobs do not really want to work and in any event have a husband fully able to support them is offered to justify denying them unemployment insurance although they remain able and willing to work.[33] This last prejudice—that women are not serious and permanent members of the workforce[34] and that lurking somewhere in each

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[32] *See, e.g.*, Struck v. Secretary of Defense, 460 F.2d 1372 (9th Cir. 1972); Gutierrez v. Laird, 346 F.Supp. 289 (D.D.C. 1972). *See also* Note, *The Equal Rights Amendment and the Military*, 82 YALE L.J. 1533, 1555-56, 1554 n.29 (1973); Note, *Pregnancy Discharges in the Military: The Air Force Experience*, 86 HARV. L.REV. 568 (1973).

[33] *See* Hanson v. Hutt, — Wash. —, 517 P.2d 599, 603 (1974) (In *Hanson*, a unanimous Washington Supreme Court struck down a section of the Washington unemployment insurance law which made pregnant women ineligible for unemployment insurance benefits for a period beginning 17 weeks before the expected delivery date and extending through the sixth week after childbirth. In so doing, the court held that discrimination on the basis of pregnancy was sex discrimination (— Wash. at —, 517 P.2d at 601-602) and that classifications based upon sex are suspect (— Wash. at —, 517 P.2d at 602-603).

[34] The percentage of women who work has increased from 20.4 percent in 1900 to 43.6 percent in 1972. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, THE ECONOMIC ROLE OF WOMEN (1973), Table 21, at 91 (1973); H. Hayghe, *Labor Force Activity of Married Women*, U.S. DEP'T OF LABOR, MONTHLY LABOR REVIEW 31 (April 1973), Table 7, at 36. Forty-one and one-half percent of these women workers are married. Thirty-one percent are mothers with children under 6 years old. *Id.* at 33. The percentage of black married women in the workforce is significantly higher than for whites; in March 1971 about 53 percent of black wives were in the labor force compared to 40 percent of white wives. WOMEN'S BUREAU, U.S. DEP'T. OF LABOR, *supra* at 96. By 1972, women constituted 37.4 percent of the national workforce, in contrast to 18.1 percent in 1900. *Id.* at 91. In California, women account for more than 40 percent of the workforce. CAL. COMM'N ON THE STATUS OF WOMEN, REPORT: CALIFORNIA WOMEN (1973), at 9.

woman's life is a man fully able to support her[35] —underlies and reinforces discrimination against women in all realms of their lives.

As the result of such stereotypes, statutory distinctions based upon sex-unique characteristics frequently bear no relation to a woman's ability to perform or contribute to society. (*See Frontiero,* 411 U.S. 677, 686.) To elaborate upon the examples previously cited, the teacher is put on mandatory maternity leave although she remains fit and able to teach;[36] the pregnant woman fully able to serve the goals of the military before and after the disability attendant upon delivery of her child is discharged although disabled men are given leaves of absence;[37] the involuntarily unemployed pregnant woman is denied benefits although her financial loss and suffering are indistinguishable from losses of other unemployed persons.[38] Thus, women are relegated to an inferior legal status without regard to their actual capacities, by ill-examined treatment of sex-unique characteristics. (*See*

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[35]The common stereotype that most women are supported by a male wage-earner and if they work at all, work only for "extras" for the family has no basis in reality. Two-thirds of all women work because of immediate economic need. Twenty-three percent are single, nineteen percent are divorced, separated or widowed. Twenty-two percent of women workers are married to men with incomes under $7200, the "modest adequacy" level established by the U.S. Department of Labor. Six percent have husbands earning less than the poverty level of $3000 per year. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, WHY WOMEN WORK, (June 1973 (rev.)). *See also,* U.S. Rep. Martha Griffiths, *The Economics of Being Female,* 9 TRIAL 10, 17 (Nov.-Dec. 1973).

[36]*See* note 31 *supra.*

[37]*See* note 32 *supra.*

[38]*See Bowen v. Hackett,* 361 F.Supp. 854, 861 (D.R.I. 1973). *Cf.* Hanson v. Hutt, ___ Wash. ___, 517 P.2d 599 (1974).

Frontiero, 411 U.S. at 687.) Their earning power is diminished or terminated, benefits available to others similarly situated are denied them, and career goals and opportunities are thwarted.[39]

That the legislative process fails women when it deals with pregnancy is understandable. The process of birth, made mysterious in literature and folklore, can only be demystified through reference to the actual experience of women. But women are notably underrepresented among lawmakers, employers and judges.[40] In addition, the centrality of the childbearing function to society's view of women's proper role and place contributes to the survival of these myths, and makes this unique physical characteristic perhaps the most fertile ground for stereotype and misunderstanding and the last, most stubborn and intractable bastion of discrimination. For the reasons stated above, the historical pattern which finally necessitated the adoption of the *Reed* and *Frontiero* standard of scrutiny in the area of sex discrimination is precisely

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[39]E. Koontz, *Childbirth and Child Rearing Leave: Job Related Benefits*, 17 N.Y.L.F. 480, 502 (1971); Comment, *Love's Labors Lost: New Conceptions of Maternity Leaves*, 7. HARV. CIV. RTS. & CIV. LIBS. L. REV. 260, 261-62 (1972); J. Getman, *The Emerging Constitutional Principle of Sexual Equality*, 1972 SUPREME COURT REV. 157, 173-74 (1972).

[40]In *Frontiero*, this Court noted: "It is true, of course, that when viewed in the abstract, women do not constitute a small and powerless minority. Nevertheless, in part because of past discrimination, women are vastly underrepresented in this Nation's decision-making councils. There has never been a female President, nor a female member of the Court. Not a single woman presently sits in the United States Senate, and only fourteen women hold seats in the House of Representatives. And, as appellants point out, this underrepresentation is present throughout all levels of our State and Federal Government. 411 U.S. 677, 686, at n.17.

what compels the application of that standard to sex-unique physical characteristics. To exempt pregnancy and other unique physical characteristics from that standard would be to erect an insuperable barrier to the legal equality of women.

Those who assert that discrimination based upon a unique physical characteristic is not sex discrimination often claim that the legislative history of the Equal Rights Amendment lends credence to their contention. Such assertions are based upon a misapprehension; the legislative history in fact rejects rather than adopts their position.

The most thorough exploration of the meaning and interpretation of the Equal Rights Amendment, which was praised by the principal proponents of the Amendment,[41] cited with approval in the Congressional reports[42] and referred to by its most vocal opponent, Senator Ervin, as the "primary legislative history" of the Amendment,[43] is the Yale Law Journal article written by Professor Thomas Emerson and three Yale law students.[44] The basic principle of the Equal Rights Amendment, as explained by the Emerson article and understood by the Amendment's proponents, is that sex is not a permissible factor for

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[41]118 Cong. Rec. S9083 (March 20, 1972). *See* Note, *The Equal Rights Amendment and the Military*, 82 YALE L.J. 1533, 1536, n.19, 20 (1973).

[42]S. REP. No. 92-689, 92d Cong., 2d Sess. 11 (1972); H.R. REP. No. 92-359, 92d Cong., 1st Sess. 6 (1971).

[43]118 Cong. Rec. S9097 (March 20, 1972).

[44]Brown, Emerson, Falk and Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971), [hereinafter cited as *Emerson article*].

determining the legal rights of women or of men.[45] Sex based classifications are prohibited; they are invalid *per se.* (*Compare McLaughlin v. Florida,* 379 U.S. 184, 189 (1964) (concurring opinion of Stewart, J.).) This standard, applied to legislation dealing with physical characteristics unique to either sex, would sometimes lead to illogical and absurd results: of necessity, only women are affected by a regulation permitting nursing mothers a three-month post-birth leave from work because of some health advantage thought to accrue to the child from nursing; only men are affected by a law concerning sperm bank donors. In such narrowly drawn laws, the unique characteristic is *necessary* to carry out the law's purpose and the purpose of the law can *only* be served by classifying on the basis of the unique characteristic.

Nonetheless, as the Emerson article points out, the individuals affected by such laws do obtain a benefit or are subject to a restriction because they are members of one or the other sex.[46] Emerson therefore recognized a "subsidiary principle" of the Equal Rights Amendment. Under this subsidiary principle, laws concerning physical characteristics unique to one sex would be subject to strict judicial scrutiny to insure the full equality of the sexes:

> The danger [that the basic principle of the Equal Rights Amendment would be undermined by permitting dual rights where unique characteristics are concerned] is increased by the possibility of

[45] *Emerson article, supra* note 44, at 880.
[46] *Emerson article, supra* note 44, at 880.

> evasion in the application of the subsidiary principle. Unless that principle is closely, directly and narrowly confined to the unique physical characteristic, it could be used to justify laws that in overall effect seriously discriminate against one sex. A court faced with deciding whether a law relating to a unique physical characteristic was a subterfuge would look to a series of standards of relevance and necessity. These standards are the ones courts now consider when they are reviewing, under the doctrine of strict scrutiny, laws which may conflict with fundamental constitutional rights.[47] 80 YALE L.J. 871, 894.

Thus, under the Equal Rights Amendment, discrimination on the basis of a unique physical characteristic would be considered sex discrimination although the standard of review would, of necessity, be different than that applied to other sex-based classifications.

Patently, no "subsidiary principle" need be developed for unique physical characteristics of the sexes when the standard of review in sex discrimination cases is something less stringent than the total prohibition of sex-based classifications required by the Equal Rights Amendment. Neither the "scrutiny" of sex-based classifications challenged under the equal protection clause required by *Reed*[48] nor the strict scrutiny advocated by the plurality in *Frontiero*[49] would require the invalidation of laws based on a unique physical characteristic where the proper de-

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[47]*See also, Emerson article, supra* note 44, at 930.

[48]Reed v. Reed, 404 U.S. 71, 75 (1971).

[49]Frontiero v. Richardson, 411 U.S. 677, 682 (1973).

gree of relationship between the classification and the purpose of the legislation was established.

Nor *should* a lower standard be created for classifications based upon sex-unique characteristics. As discussed above, pp. 35-38, the unique physical status of pregnancy is the central theme and rationale for the historic phenomenon of sex discrimination. The danger of isolating discrimination based on pregnancy from the general principle of sex equality is that that unique characteristic will become the pretext or subterfuge for governmental bias, the last resort of the notion that women are in "a class by themselves." (*Cf. Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971); Brown, *et al., The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 894 (1971).) Therefore, considerations which require scrutiny of sex-based classifications also require that discrimination on the basis of unique physical characteristics be subject to the same scrutiny.

Only when classifications based on pregnancy are scrutinized as are other sex-based classifications can the stereotypes which have made women second class citizens be eliminated. The beneficial and even surprising results of discarding assumptions about the uniqueness of the trait in favor of assessing actual similarities and differences is illustrated in the following quotation from *Green v. Waterford Board of Education*, 473 F.2d 629 (2d Cir. 1973):

> The heart of plaintiff's case is that disqualifying a physically capable woman from working be-

cause of a condition related solely to her sex is unconstitutionally discriminatory. Plaintiff admits the obvious, that men do not become pregnant, but points out that men, being human, are also subject to crises of the body, some of which, like childbirth, give ample warning: a cataract operation or a prostatectomy, for example, may be planned months ahead. Because male teachers are not forced by defendant Board to take a premature leave because of a known forthcoming medical problem, female teachers should not be treated differently. *Thus stated, the argument is persuasive, even compelling. One realizes with a shock what so many women now proclaim: Old accepted rules and customs often discriminate against women in ways that have long been taken for granted or gone unnoticed.*

473 F.2d 629, 634. (Emphasis added.)

The centrality of woman's biological reproductive role to historical and current discrimination against women on the basis of sex stereotypes leads to the inescapable conclusion: So long as classifications based upon unique physical characteristics are thrust outside the bounds of judicial scrutiny, so long will women suffer unwarranted and arbitrary discrimination because they are women.

II.

THE STANDARD OF REVIEW

This Court has traditionally employed a two-tier standard of review in equal protection cases. In cases involving suspect classifications, such as race,[50] national origin,[51] or alienage,[52] or touching upon fundamental interests, such as the right to travel[53] or the right to privacy,[54] the Court applies a strict standard of review, requiring the state to establish that the distinctions drawn by the law are necessary to further an overriding state interest.[55] In the area of economic and social legislation, the Court, investing legislation with a presumption of constitutionality, requires only that distinctions drawn by the challenged statute bear a rational relationship to a legitimate state purpose.[56]

While the two-tiered system of review undoubtedly has continuing vitality[57] it appears that the hard dichotomy between strict and minimal scrutiny is undergoing a perceptible softening at the "lower tier".[58] Particularly is this apparent in cases chal-

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[50] *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964).

[51] *See, e.g.*, Oyama v. California, 332 U.S. 633, 644-646 (1948).

[52] *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 372 (1971).

[53] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1968); Dunn v. Blumstein, 405 U.S. 330 (1972).

[54] *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1964).

[55] *See Developments In the Law—Equal Protection*, 82 HARV. L.REV. 1065, 1087-1131 (1969) (and cases cited therein).

[56] *Id.*

[57] *See* San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 17 (1973).

[58] Gunter, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L.REV. 1, 25-33 (1972).

lenging classifications based on gender, where this Court, in *Reed v. Reed,* stated that classifications based upon sex are subject to "scrutiny." 404 U.S. 71, 75 (1971). Thus, minimally, the standard of review in this sex discrimination case is that stated in *Reed*:

> A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a *fair* and *substantial* relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."
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> 404 U.S. 71, 76. (Emphasis added.)

However, for reasons more fully stated below, Appellees contend the statute challenged in this action should be subjected to strict scrutiny because the classification meets all of the Court's established criteria for "suspectness" and in addition impinges upon a fundamental right.

A. Sex-based classifications are constitutionally suspect.

Despite what appears in recent cases to be a re-examination of the rigid two-tier approach in equal protection cases, the criteria for designating certain classifications as "suspect" continues to inform the Court's decisions on which classifications should be subject to strict judicial scrutiny. Thus, in declining to subject classifications based on membership in a "poor" school district to the highest standard of review, Justice Powell in *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973) applied those criteria as follows:

> The system of alleged discrimination and the class it defines have none of the traditional indicia

of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. 411 U.S. 1, 28.

In contrast, a plurality of the Court applying those criteria to gender-based classifications, in *Frontiero v. Richardson,* 411 U.S. 677 (1973), concluded that such classifications should be treated as suspect:

> [S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility." [citation omitted] And what differentiates sex from such nonsuspect statutes (sic) as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members. 411 U.S. 677, 686.

The plurality's holding coincides with a recent and growing recognition that gender discrimination is as pervasive and costly to society and its disadvantaged members as racial discrimination and requires the same affirmative and stringent measures to eradicate

it.[59] Thus, federal and state governments have added gender to statutes which originally prohibited only race discrimination.[60] Similarly, a number of state and federal courts have declared gender-based classifications suspect.[61]

Even as remedies for sex discrimination multiply, however, evidence of the intransigence of gender bias accumulates. For example, despite the Federal Equal Pay Act, 29 U.S.C. §206(d), passed in 1963, the pay

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[59]For example, in 1970, the Senate Committee on Labor and Public Welfare reported:

> Discrimination against women is generally practiced in a fashion far more overt, and with much less concern for either law or social niceties than is discrimination based on race.... This kind of blatantly disparate treatment is particularly obnoxious in view of the fact that while Title VII has been on the statute books for over five years, its proscription of sex discrimination continues to be widely regarded as a kind of legislative accident. S. Rep. No. 91-1137, 91st Cong., 2d Sess., 5, 6 (1970).

In 1971 the House Committee on Education and Labor, citing the failure of both judicial and EEOC efforts to eradicate sex discrimination, stated that:

> discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination [despite the fact that many believe sex discrimination to be] morally or physiologically justifiable. *H.R.* No. 92-238, 92d Cong., 2d Sess. 5 (1971).

[60]Ch. 1508, Stat. 1970, *amending* Cal. Labor Code §1412 (West 1973 Supp.); Ch. 397, Stat. 1965, *amending* Mass. G.L.A. Ch. 151B, §4 (1971); P.A. 1966, No. 349, *amending*, 20 Mich. C.L.A. §423.303a (1967); H.610, L.1973, *amending* Ohio Rev. Code §4112.02(A) (1973); P.L. 133, L.1969, *amending* 43 Pa. S. §955 (1964); Exec. Order No. 11375, 3 C.F.R. 320 (1967).

[61]*See, e.g.*, Ballard v. Laird, 360 F.Supp. 643 (C.D.Cal. 1973); Weisenfeld v. Secy. of H.E.W., ___ F.Supp. ___, 42 U.S.L.W. 2326 (Dec. 25, 1973) (D.C.N.J. 1973) (three-judge court); Thorn v. Richardson, ___ F.Supp. ___, 4 E.P.D. ¶7586, ¶7630 (W.D. Wash. 1971); Hanson v. Hutt, ___ Wash. ___, 517 P.2d 599 (1974); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1972).

gap between men and women has continued to widen,[62] and the percentage of women in certain professions has declined rather than increased.[63] Perhaps most significantly, sex bias remains a more reliable index of poverty than race bias.[64] At the same time, whole areas of social concern which were previously unscrutinized in terms of their impact on women have been revealed as discriminatory.[65]

The new national consciousness of the inequities women (and men) face because of their gender has resulted in an increasing number of legal challenges to discriminatory laws at all judicial levels. This

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[62]In 1966, women earned 63.3% of what men earned. By 1971, women earned only 59.5% of what men earned. U.S. Dept. of Labor, Women's Bureau, Economic Report of the President 104 (1973). When this is adjusted for differences in average full-time hours worked, the gap slightly decreases (from 65.9% in 1969 to 66.1% in 1971). *Id.* Even when adjusted, however, the clerical workers' gap increased from 70.0% in 1969 to 66.9% in 1971. *Id.* In 1970, clerical workers were 73.6% women. *Id.* at 157.

[63]*Id.* at 155-59 (*e.g.* architects, social scientists, authors, photographers); Carnegie Comm'n on Higher Education, Opportunities for Women in Higher Education 111 (1973) (professors).

[64]"Sex bias takes a greater economic toll than racial bias. The median earnings of white men employed year-round full-time is $7,396, of Negro men $4,777, of white women, $4,279, of Negro women $3,194. Women with college education, both white and Negro, earn less than Negro men with 8 years of education. Women head 1,723,000 impoverished families, Negro males head 820,000." A Matter of Simple Justice: The Report of the President's Task Force on Women's Rights and Responsibilities 18 (1970).

[65]*See, e.g.*, Note, *The Sexual Segregation of American Prisons*, 82 Yale L.J. 1229 (1973) (disparate treatment of women in prison); Note, *The Equal Rights Amendment and the Military*, 82 Yale L.J. 1533 (1973) (discrimination against women in the military); *Hearings Before the Joint Economic Committee*, 93d Cong., 1st Sess. (July 12, 1973) (discrimination against women in insurance).

Court, which since *Reed* has had the opportunity to review the problems of sex discrimination in several significant aspects,[66] is no longer dealing with a novel question, the dimensions and seriousness of which have not been brought before it.

For all these reasons, Appellees believe that the time is right for a decision that sex-based classifications should be held to be suspect and subject to strict judicial scrutiny. Appellees further contend that the instant case is a singularly appropriate one for such a holding. Because of the centrality of pregnancy and childbearing to the role concepts which have been the rationale for discrimination against women,[67] the decision to declare sex a suspect classification in this context would reach the root cause of classifications which were and are the result of stereotyped notions and generalizations about women. Such a holding would go far to ensure that legislative classifications could no longer be based on sex-role stereotypes or inalterable sex characteristics which bear no necessary relationship to an individual's need, ability or life situation.

B. Laws which burden the exercise of a fundamental right are subject to strict scrutiny.

This Court's opinion in *Cleveland Board of Education v. LaFleur, supra,* — U.S. —, 42 U.S.L.W. 4186

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[66]Frontiero v. Richardson, 411 U.S. 677 (1973); Shevin v. Kahn, No. 73-78, *probable juris. noted,* 42 U.S.L.W. 3246 (Oct. 23, 1973). *See also,* Cleveland Board of Education v. LaFleur, — U.S. —, 42 U.S.L.W. 4186 (1974); Stanley v. Illinois, 405 U.S. 645 (1972).

[67]See pp. 35-38, *supra.*

(1974) most recently declared that the decision whether or not to bear and beget a child is part of the fundamental right to privacy in matters of marriage and family life. *See also Roe v. Wade,* 410 U.S. 113 (1973); *Eisenetadt v. Baird,* 405 U.S. 438 (1972); *Loving v. Virginia,* 388 U.S. 1, 12 (1967); *Griswold v. Connecticut,* 381 U.S. 479 (1964); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925); *Meyer v. Nebraska,* 262 U.S. 390 (1923).

The strict scrutiny test is applicable not only where the denial of a fundamental right is absolute, but also where state regulation penalizes its free exercise. *See e.g., Memorial Hospital v. Maricopa County,* ___ U.S. ___, 42 U.S.L.W. 4277 (1974); *Shapiro v. Thompson,* 394 U.S. 618, 634 (1969). Laws or regulations must not "needlessly, arbitrarily or capriciously impinge upon this vital area of a teacher's constitutional liberty." *Cleveland Board of Education v. LaFleur,* ___ U.S. ___, 42 U.S.L.W. 4186 (1974).

As in *LaFleur,* the law challenged in this case does not deprive a woman of her right to decide whether or not to bear a child. It does, however, penalize and burden her exercise of that right. Unlike *any other* disabled worker in the State of California covered by the state disability insurance program, the woman who suffers a disability in connection with her pregnancy is left to bear the economic consequences of her inability to work. As a result of her pregnancy, a woman faces medical bills, the possible cost of temporary help and, if her pregnancy is successfully concluded, a new child to support at the very time she

is unable to bring home wages to pay for these expenses. Since more than half of the wives in the labor force work because of absolute economic necessity,[68] the loss of salary is as devastating for them as for any other disabled worker. The denial of benefits available to other workers therefore constitutes a substantial burden upon her exercise of her right to bear a child and the State must demonstrate a compelling interest in its classification.[69]

III

APPELLANT'S EXCLUSION OF DISABILITIES CAUSED BY PREGNANCY AND CHILDBIRTH IS NOT NECESSARY TO THE REALIZATION OF A COMPELLING STATE INTEREST AND HAS NO FAIR OR SUBSTANTIAL RELATION TO THE OBJECTIVE OF CALIFORNIA'S DISABILITY INSURANCE PROGRAM.

A. The objective of the California disability insurance program is to compensate for economic burdens caused by disability of any type.

Section 2601 of the Unemployment Insurance Code sets forth the Legislature's intent in enacting the disability insurance program:

> The purpose of this part is to compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury and to reduce

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[68] In March 1967, 61.3% of the wives in the labor force had husbands who earned less than $7000 per year, characterized by the U.S. Department of Labor as the minimum level of modest adequacy. U.S. DEP'T OF LABOR, 1969 HANDBOOK ON WOMEN WORKERS, WOMEN'S BUREAU BULLETIN 294, at 34.

[69] Ironically, the Appellant also denies benefits to women disabled because of an abortion. Thus women are penalized both for choosing to bear a child and for choosing not to bear a child.

> to a minimum the suffering caused by unemployment resulting therefrom. This part shall be construed liberally in aid of its declared purpose to mitigate the evils and burdens which fall on the unemployed and disabled worker and his family.

As discussed pp. 9-24, *supra*, the Legislature has made California's one of the most liberal of all such programs by pooling all risks in one fund, extending coverage to persons having a tenuous relationship to the labor force (including the deceased), granting proportionally greater benefits to more poorly paid workers, and compensating virtually all disabling conditions regardless of cause.

Appellant now seeks to bootstrap his principal justification of the discriminatory exclusion challenged herein—that it costs too much to extend benefits on a nondiscriminatory basis—into a justification based on some asserted central legislative intent to hold costs to a minimum, especially within the limits of an allegedly hallowed one percent contribution rate. Finally, Appellant asserts that the "legislative objective" was *not* to grant the benefits at issue in this action, an intention made obvious by the statute itself but of questionable relevance to the relation of the exclusion to the objectives of the entire program.

That the Legislature intended for the program to be self-sustaining is rather obvious. The relevance of such a statement is dubious, however. First, even Appellant does not contend that granting women benefits for disabilities caused by pregnancy or parturition would threaten the self-sustaining nature of the

fund.[70] Rather, the question is one of the Legislature's readiness to increase program resources. In the past the Legislature has been ever ready to do so.[71] Second, assuming that financing of the program were threatened, which it is not, it is difficult to construe the Legislature's *procedure* for financing the program on the same level as the legislative purpose of the program as stated in the enabling legislation. *Cf. United States Department of Agriculture v. Moreno,* 413 U.S. 528 (1973); *Cleveland Board of Education v. LaFleur,* ___ U.S. ___, 42 U.S.L.W. 4186 (1974). Similarly, the fact that a one percent contribution rate has usually been used to finance the fund does not enshrine the rate itself as a substantive objective of the Legislature.[72] Moreover, there is no evidence that the one percent contribution rate could not be maintained

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[70]CAL. UNEMP. INS. CODE §2604 empowers the director to modify the duration or level of benefits in an emergency in order to protect the solvency of the fund pending action by the Legislature.

[71]The Legislature transferred $70 million into the fund in 1961 from the Unemployment Insurance Fund. CAL. UNEMP. INS. CODE §3006. This sum represented about one-half of sums collected from employees during 1944 and 1945 for the Unemployment Fund. Milliman and Robertson, Inc., *supra* note 6, at 3. Apparently another $70 million potentially available for the Disability Insurance Fund still lies in the Unemployment Fund. The Legislature has also raised the taxable income limit several times (CAL. UNEMP. INS. CODE §985) in order to increase program funds.

[72]The fact that the taxable income limit has been raised instead of the rate is consistent with the statutory scheme of paying proportionally more to lower paid workers. The taxable income limit itself is a regressive feature of the act; raising the limit instead of the rate makes it somewhat less regressive. The rate has been raised once for all workers: to 1.1% for six months in 1965. See Appellant's Br. at 14, n.10. A rate of 1.25% has always been charged for self-employed individuals who choose to be covered by

were Appellant to grant the benefits claimed in this action.[73]

Appellant also declares that a central purpose of the California program is *not* to grant benefits such as those requested in this action. It is presumed the Legislature intended its statute to operate as it does. But such a purpose would not validate the exclusion any more than Illinois' intent to exclude unwed fathers from guardianship of their children or Idaho's intent to exclude all women from estate administration could validate statutes whose constitutionality was questioned in this Court. *Stanley v. Illinois,* 405 U.S. 645 (1972); *Reed v. Reed,* 404 U.S. 71 (1971). Moreover, to the extent that the motives of the Governor or the Legislature are relevant to legislative intent as expressed in the statute (*cf. Palmer v. Thompson,* 403 U.S. 217 (1971)), a review of the history cited by Appellant reveals that the Legislature most desired to exclude benefits for child *rearing,* not child *bearing.*[74] To the extent that such a concern

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the program. CAL. UNEMP. INS. CODE §984. The Legislature also took the unusual step of requiring the director to report to the Legislature and Governor "at once" whenever he believes that a "change of contributions rate . . . may become necessary. . . ." CAL. UNEMP. INS. CODE §2604.

[73]Appellant has not furnished any data to the court below or to this Court stating the amount of money that would be forthcoming were the taxable income limit raised or eliminated. As discussed *infra,* Appellant's cost estimate for granting benefits is greatly inflated.

[74]Rhode Island at first compensated women not only for medical disabilities suffered in pregnancy and parturition, but also, on an unquestioning basis, for child *rearing* leave subsequent to the end of medical disability. See E. Koontz, *Childbirth and Child Rearing Leave: Job-Related Benefits,* 17 N.Y.L. FORUM 480, 484-85 (1971). The concern about "maternity benefits" and its confusion with disability benefits also appears in Rentzer v. Cal. Unemp. Ins.

might be legitimate, the exclusion of Section 2626 is simply arbitrarily overbroad, for Appellant himself admits the distinguishability between leaves for child rearing and disabilities caused by child bearing. Appellant's Brief at 20.

Appellant's set of objectives is really only one, as expressed in Section 2601 and as interpreted by the pooled risk coverage extended to all types of workers for all types of disabilities. As the District Court below noted, with reference to the compensatory purpose expressed in Section 2601:

> Clearly the exclusion of pregnancy-related disabilities does not promote this purpose; the economic hardship pregnant women suffer when they cannot work is identical to the hardship of other disabled workers. 359 F.Supp 792, 797.

B. Disabilities caused by pregnancy and childbirth are similar in all relevant respects to disabilities now compensated.

Pregnancy and childbirth are biological processes accorded great value in any society because they are necessary to the survival of humanity. So infused have these temporary biological states become with talismanic mystery and veneration that we at times lose sight of the fact that very ordinary injuries to the

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App. Bd., 32 Cal. App. 3d 604, 606 (1973), cited in Appellant's Brief, p. 7. Rentzer has no relevance here. The question presented was limited, the court's reasoning was questionable, its decision became final after the District Court's decision herein, and its holding has been rendered moot by enactment of § 2626.2. (Appellees' Memo. in Opp. to Motion to Reconsider (July 9, 1973).) In any event, the exclusion of pregnancy-related disabilities was not the only and perhaps not even the major money-saving "difference" between the Rhode Island and California programs. See SINAI, FOR THE DISABLED SICK: DISABILITY COMPENSATION (U. Mich. School of Pub. Health 1949 at 35-41, 65-66).

body occur as a result of childbirth, injuries similar to those now compensated under the California disability insurance program. Appellant seeks to distinguish coverage of such disabilities by asserting that (1) "pregnancy" is neither illness nor injury, (2) disabilities resulting from pregnancy and childbirth are distinguishable in some other relevant respect from disabilities now covered by the California program, and (3) labor force participation patterns of mothers of very young children justify such differential treatment. These contentions are devoid of merit.

1. Disabilities resulting from pregnancy and childbirth are not medically distinguishable from disabilities now covered by the California program.

On March 2, 1974, the American College of Obstetricians and Gynecologists adopted the following Policy Statement on Pregnancy-Related Disabilities:

> Pregnancy is a physiological process. All pregnant patients, however, have a variable degree of disability on an individual basis, as indicated below, during which time they are unable to perform their usual activities. (1) In an uncomplicated pregnancy, disability occurs near the termination of pregnancy, during labor, delivery and the peurperium. The process of labor and peurperium is disabling in itself. The usual duration of such disability is approximately six to eight weeks. (2) Complications of a pregnancy may occur which give rise to other disability. Examples of such complications include toxemia, infection, hemorrhage, ectopic pregnancy and abortion. (3) A woman with preexisting disease which in itself is not disabling, may become dis-

abled with the addition of pregnancy. Certain patients with heart disease, diabetes, hypertensive cardiovascular disease, renal disease, and other systemic conditions may become disabled during their pregnancy because of the adverse effect pregnancy has upon these conditions.

The onset, termination and cause of the disability, related to pregnancy, can only be determined by a physician.

By far the preponderance of disability days resulting from pregnancy and parturition, in the absence of complications, are due to the birth of the child. The Biblical recognition that "in pain thou shalt bring forth children" (Genesis 3:16) may have been modified by modern natural childbirth methods and anesthesia which reduce pain caused by tension and anxiety, but the fact that injury is sustained by various parts of a woman's body is confirmed by common medical knowledge.[75]

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[75] *See* H. AVNET, PHYSICIAN SERVICE PATTERNS AND ILLNESS RATES (1967) listing in a section devoted to "Morbidity Studies" (pp. 265-346) tables which include under the heading *illness*, deliveries and complications of pregnancy, childbirth and puerperium, pp. 276, 281, 283, 293, 296, 301, 308, 320, and indicate the number of days in hospital, incidence as compared with other disabilities, and comparative utilization of physician services. Table 127 on p. 273, headed "Selected Incidence Rates," shows "Normal Delivery" nineteenth in the list. In the chart headed "Incidence of Attended Illness by Diagnostic Category" there are 22 diagnostic categories in descending order of frequency with "Deliveries and Complications of Pregnancy, Childbirth and Puerperium" the 17th listed. Table 162 on page 428 shows the average length of days' stay in hospital with 4.4 for deliveries and complications of pregnancy, childbirth and puerperium. The average for diseases of the circulatory system is 12, for diseases of bones and organs of movement, 10.1, for diseases of male genital organs, 8 days.

Virtually the entire reproductive tract of a woman is injured to some extent during childbirth.[76] The uterus, cervix, birth canal, vulva and perineum are all affected. "Normal" parturition also frequently involves injuries to the urinary tract and other changes affecting a woman's mental and physical health.

Perhaps the most graphic illustration of injury attendant upon normal birth, however, is the surgical incision called an episiotomy. An episiotomy is the incision made in the perineum—the area between the posterior opening of the vagina and the rectum—in order to expand the vaginal opening to facilitate birth.[77] Episiotomies are now performed in an overwhelming majority of deliveries. "Except for cutting

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[76]See text discussion, *infra*. Appellant presented no evidence whatsoever to the contrary before the District Court, and never argued that childbirth is not accompanied by attendant injury to the female body. Appellant seeks to raise this factual issue for the first time before this Court, relying solely on one deposition from an action not before this Court and one article regarding the sociological status of pregnant (not puerperal) women.

[77]Episiotomies are performed routinely to avoid the substantial danger of a jagged and uncontrolled perineal tear, resulting in a wound that is larger, slower to heal, and more difficult to repair surgically. R. DOUGLAS AND W. STROMME, OPERATIVE OBSTETRICS 505 (2d ed. 1965). "In about one-half of all primiparae, the laceration [without episiotomy] is rather extensive." BECK, OBSTETRICAL PRACTICE 962 (6th ed. 1955). *See also* EASTMAN AND HELLMAN, WILLIAMS OBSTETRICS 399 (13th ed. 1966). So great is the pressure on the perineum that one study found significant perinneal lacerations in over one of five women having their first child even with an episiotomy. Harris, *An Evaluation of the Median Episiotomy*, 106 AM. J. OF OBS. AND GYN. 660, 664-65 (1970). That extensive lacerations occur in over 20 percent of episiotomized primagravidas as part of "normal" birth, attests to the broad use of the word "normal" in this context. See note 20, *supra*.

and tying the umbilical cord, episiotomy is the most common operation in obstetrics."[78]

In a normal birth, the uterus contracts to expel the foetus through the birth canal. The placenta, which is attached to an internal layer of the uterus cannot contract, and is gradually sheared off.[79] The resulting state of the uterine wall has been described as a great "wound area".[80] Although excessive blood loss from uterine hemorrhage is a complication of birth, the fatal risk of such hemorrhage is one of the primary concerns of the puerperium, and requires most women to restrict their physical activity for a period following birth.[81] During puerperium, the uterus continues

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[78]EASTMAN and HELLMAN, *supra* note 77, at 433. For incidence of episiotomy, see DOUGLAS AND STROMME, *supra* note 77, at 504 (79.3% of all authors' patients); LAW, Standards of Obstetric Care: The Report of the Northwestern Metropolitan Regional Obstetric Survey, 1962-1964 (1967) at 59 (between 85 and 90% of all primiparae).

[79]J. WILLSON, C. BEECHAM, AND E. CARRINGTON, OBSTETRICS & GYNECOLOGY 423 (2d ed. 1963); GUYTON, TEXTBOOK ON MEDICAL PHYSIOLOGY 987 (4th ed. 1971).

[80]Separation of the placenta "creates a wound area that extends over the entire inner surface of the uterus". DAVIS, ed., 1 GYNECOLOGY AND OBSTETRICS 7 (rev. ed. 1972). "The branches of the uterine arteries . . . eventually open into the large sinuses in the decidua basalis at the placental site. The source of the blood loss after delivery, except that due to soft tissue injury, is the sinuses which are left open by separation of the placenta. Excess bleeding is prevented by firm contraction of the uterine muscle bundles . . . . This is followed by clot formation and retraction, the usual method by which bleeding from open vessels is controlled." WILLSON, *et al.*, *supra* note 79, at 423.

[81]"For the mother the third stage is the most dangerous part of the entire labor because abnormalities in separation and expulsion of the placenta may be accompanied by profuse bleeding. The total maternal mortality from hemorrhage is not always obvious because excessive bleeding may cause death by reducing the patient's ability to cope with other complications. [Citing studies]." *Id.* at 421. It has therefore been recommended that the

to contract to its former size, causing acute pain for many women from recurring contractions lasting up to a minute during the first few days of this period.[82]

As the child passes from the uterus, through the cervix, down the vagina, and out the vulva (vaginal opening), its progress results in other injuries. "[S]ome degree of injury to the cervix is invariably the rule,"[83] with lacerations, edema, and hemorrhage being regarded as unavoidable.[84] In the vagina itself, "[s]ome damage to the soft tissue structures of the birth canal occurs during every delivery."[85] Although severe vaginal lacerations are rare, even a fatal vaginal laceration has been said to occur during *normal* birth.[86] Finally, as the child emerges, the vulva is

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woman should not go up and down stairs for a week, and should limit her activity for a week or two. *Id.* at 574. Amicus Curiae National Association of Manufacturers quotes Dr. John C. Donovan as testifying that for ten to twelve days after delivery there is enough risk of uterine hemorrhage, along with other medical illness or injury, to justify a conclusion that the woman is "at risk," or clinically disabled. See Brief of National Association of Manufacturers as Amicus Curiae at 8-9.

[82]WILLSON, *et al.*, *supra* note 79, at 573; A. GUTTMACHER, PREGNANCY, BIRTH AND FAMILY PLANNING 241 (1973). Such puerperal contractions are found especially in multigravidas. *Id.*

[83]DOUGLAS AND STROMME, *supra* note 77, at 527; *see also* EASTMAN and HELLMAN, *supra* note 77, at 921.

[84]"Microscopically, the cervix immediately after delivery, is the seat of such marked edema, congestion and hemorrhage that its usual constituents cannot be easily distinguished. Within a few days, this picture disappears, and regeneration of the muscle and connective tissue follow." BECK, *supra* note 77, at 384. Beck regards laceration as inevitable in primiparous women (*id.* at 961). *See also,* KERR AND MOIR, OPERATIVE OBSTETRICS 842 (5th ed. 1950).

[85]WILLSON, *et al.*, *supra* note 79, at 535. Vaginal soft tissue damage is more pronounced in primagravidas. *Id.*

[86]Jewett, *Fatal Laceration from Normal Birth*, 287 N. ENG. J. OF MED. 44 (1972). Severe vaginal lacerations have been said to have an incidence of from 3.2% to 6.2%. Law, *supra* note 78, at 60.

traumatized and "should be regarded as an open wound during the early days of the puerperium, and every precaution should be taken to protect against its infection."[87]

These injuries to tissues and organs concerned with reproduction are all part of "normal" parturition. All of them involve physiologic states which are abnormal states necessarily connected with "normal" parturition.[88] It is no wonder that maternal mortality rates are a measure of a nation's advances in health care.[89]

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[87]BECK, *supra* note 77, at 388; *see also* EASTMAN AND HELLMAN, *supra* note 77, at 433.

[88]For instance, "[T]he pressure of the pregnant uterus and its intra-abdominal displacement effects, together with the action of sex hormones, leads to dilation and partial dysfunction of the renal pelvis, uretic and urinary bladder. . . . The urinary bladder also frequently is traumatized during delivery, whereupon it becomes edematous and hyperemic." DAVIS, *supra* note 80, at 11. There may also be submucosal hemorrhage of the bladder from the trauma of delivery. WILSON, *et al.*, *supra* note 79, at 568. Excess fluid is eliminated through a marked diuresis beginning within one to two days after delivery, but "the patient may have difficulty in voiding because of perineal pain or local edema from trauma." *Id.* at 571; *see also* EASTMAN AND HELLMAN, *supra* note 77, at 479.

Other marked changes take place regarding blood. In a normal delivery, the woman losses 500 ml. (1 pint) of blood. Moreover, the "fibrinolytic system [involving blood clotting] is profoundly activated in the first few hours after delivery and gradually falls to normal nonpregnant values by the fourth day postpartum. . . . Stress, both physical and emotional, is known to be associated with activation of the fibrinolytic system". Manning, *et al.*, *The Fibrinolytic System in Late Pregnancy, Labor and the Early Puerperium*, 110 AM. J. OF OBS. AND GYN. 900, 904-05 (1971). Postpartum involution of the pituitary (the anterior lobe of which has almost doubled during pregnancy), and sudden decreases in production of thyroid and other hormones are also held responsible for psychological malaise in the first four days or so of the puerperium. BAKER, PSYCHIATRIC DISORDERS IN OBSTETRICS 34 (1967); EASTMAN AND HELLMAN, *supra* note 77 at 349, citing HAMILTON, POSTPARTUM PSYCHIATRIC PROBLEMS (1962).

[89]The maternal mortality rate in the United States for 1968, 1969, and 1970, respectively, was 24.5, 27.5, and 24.7 deaths per

The fact that these bodily injuries or abnormal physiologic states occur during parturition and the puerperium does not mean that all women will be *disabled* for the same amount of time, but rather that disabilities which *do* result are rooted in real injuries and illnesses which are neither statistically "normal" nor desirable physiologic states for the affected body. Society's congratulatory response to a woman during the puerperium has little relevance to the simple fact that she has usually experienced physical trauma and is almost always disabled from working for some period of time.[90] Were these injuries to reproductive and genital tissues to occur to a male, or to a woman apart from parturition, the disabilities resulting therefrom would unquestionably be compensable under Califor-

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100,000 live births. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 1972, at 57. Maternal mortality is still among the leading causes of death for American women of childbearing age. Hern, *Is Pregnancy Really Normal?*, 3 FAMILY PLANNING PERSPECTIVES 5, 8 (1971).

[90]Appellant puts great stock in the fact that pregnant women are not treated as if they are sick by society. Appellant's Br. at 18-19, citing McKinlay, *The Sick Role—Illness and Pregnancy*, 6 Soc. Sc. AND MED. 561, 568-71 (1972). The obvious answer is that pregnant women are not treated as if they were disabled because they are not; women recuperating from childbirth *are* treated as ill or injured, again because they are. Pregnancy may be necessary for survival of the species, but parturition jeopardizes individual health, as maternal mortality and morbidity rates make clear. Moreover, a pregnant woman does not have to "get well," but the ill and the postparturient must limit their activity until they do so. Motivation to recover may be crucial to the duration of recovery for a postpartum woman, *e.g.*, motivation to perform pelvic exercises which strengthen the abdominal muscles. (*See* WILLSON, *et al.*, *supra* note 79, at 572-73.)

nia's disability insurance program. If pregnancy-caused and parturition-caused disabilities are to be distinguished from disabilities now compensated by the California program, it cannot be on the grounds that these disabilities are not caused by injury or illness.

The District Court concluded that "the effects of pregnancy and pregnancy-related illness are debilitating in much the same way as the physical and mental conditions that are included within the scope of the disability insurance program." 359 F.Supp. 792, 797. Its factual holding is in accord not only with medical fact but also with courts which have passed on the question. *See, e.g., Green v. Waterford Board of Education,* 473 F.2d 629, 634 (2d Cir. 1973); *Heath v. Westerville Board of Education,* 345 F.Supp. 501, 506 (S.D. Ohio 1972); *Wetzel v. Liberty Mutual Ins. Co.,* — F. Supp. —, 7 E.P.D. ¶9097 (W.D. Pa. 1974); *Dessenberg v. American Metal Forming Co.,* Civ. Action No. C-72-48T (N.D. Ohio, Oct. 3, 1973). *Cf. Cleveland Board of Education v. LaFleur,* — U.S. —, 42 U.S.L.W. 4186, 4190 (1974).[91]

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[91] A New York teacher won reinstatement to her job under a provision prohibiting discharge for absence due to temporary illness, the Court stating: "It is pure sophistry to argue . . . that maternity is an indication of health, and therefore cannot be said to cause 'serious personal illness'." People ex rel. Peixotto v. Board of Education, 82 Misc. 684, 692, 144 NYS 87 (Sup. Ct. 1913). Accord, Cerra v. East Stroudsburg Area Sch. Dist., 299 A.2d 277 (Pa. 1973).

Judge Cayton, retired Chief Judge of the District of Columbia Court of Appeals, arbitrating an employee grievance for sickness and accident benefits due to normal childbirth, awarded benefits,

Appellant's admission that women are disabled for a short period after childbirth, coupled with his unwillingness to distinguish between this disability and maternity leave, strikingly pinpoints the sex stereotyping involved in this case.[92] In this state program,

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stating: "The contract section neither includes nor excludes maternity conditions. But it is fair to say that the section was written into the contract in order to assure a continuing income for employees unable to work because of physical disability. The section speaks of 'sickness benefits' and 'absence due to illness' and there is no reason in logic or fairness to hold that there must necessarily be a showing of a disease or malady which was morbid in nature, or which undermined the employee's constitution. . . . I am satisfied it is . . . accurate to say that pregnancy is a physiological condition, involving substantial changes in various organs of the mother's body. We may properly take 'judicial notice' . . . that labor and confinement result in some amount of trauma and debilitation. Such was the situation here. . . . In everyday language, she went to the hospital to have a baby; she was attended by a doctor; leaving the hospital in three days. She went through a process of healing and convalescence; and after an absence of six weeks she was able to go back to work. She had no infection or other complication and it is not claimed that she was gravely ill. On the other hand, what she suffered was clearly much more than a mere trifling or passing indisposition; it was a substantial impairment of her strength and her body functions, which made it impossible for her to perform her usual work. It would be unrealistic to hold that she was not entitled to the sickness benefits above described." Washington Publishers Assn., 39 L.A. 159, 160 (1962).

[92]Appellant states that "it is possible to distinguish between maternity leave and the shorter period of time a female employee is actually unable to work because of childbirth. . . ." (Appellant's Br. at 20.) Similarly, an amicus paradoxically emphasizes the fact that the Department of Health, Education, and Welfare considers the two weeks following delivery to be an illness, but not subsequent periods. (American Telephone and Telegraph Co., as Amicus Curiae, at 11-12, note 25.) Another amicus ironically stresses medical testimony that all women are "at risk" for ten to twelve days following delivery, with longer periods necessary for some individuals but more often due to sociological causes. (National Association of Manufacturers as Amicus Curiae, at 8-9.)

as in society itself, the joys and blessings of motherhood are touted while the physical traumas of childbirth are studiously overlooked. Yet childbirth is both a blessing and a burden. To recognize that childbirth gives rise to verifiable physiological injuries is not to demean its real and substantial benefits, but for the state to recognize only the benefits for purposes of its disability laws is to resort to a pleasant mythology in the face of medical fact.

2. Disabilities resulting from pregnancy and childbirth are not distinguishable in any other relevant respect from disabilities now covered by the California program.

Appellant contends that the exclusion of disabilities caused by pregnancy and childbirth from program coverage is justified on the theory that such disabilities may be said to be "voluntary," "predictable," or "normal." As Appellees have previously discussed, however, pp. 20-24, *supra,* the program now covers all disabilities without regard to whether they are in some sense "voluntary," "predictable," or "normal." Even if it were true, therefore, that all pregnancies and births were normal and voluntary, and that the disabilities resulting therefrom could also be said to be normal and voluntary, exclusion from coverage under California's program would not be justified.

Appellees have previously noted the problems of defining what is voluntary, note 19 *supra.* But in any common sense use of the word, it cannot seriously be contended that all pregnancies are voluntary. *Cf. Roe v. Wade,* 410 U.S. 113 (1973). Contraceptives are

not infallible.[93] Nor are they acceptable as a means of birth control to a substantial percentage of the population, who may nevertheless wish to avoid having more children. The number of unwanted pregnancies that are not aborted for reasons of health, philosophy, or religion is unknown, but to characterize such unwanted births as "voluntary" requires a special use

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[93]None of the contraceptive devices currently in use are 100 percent effective. Three out of 1000 condoms are defective upon receipt from the manufacturer and one out of 300 break or tear in use. Two to three percent per year of women using a diaphragm at all times during intercourse become pregnant. One-tenth of one percent per year of women using a combined oral contraceptive become pregnant and five-tenths of one percent of those using a sequential contraceptive become pregnant. One and one-half percent to three percent of all women using an intra-uterine device become pregnant during the first year of use. S. J. Segal, *Contraceptive Technology*, REP. ON POPUL. & FAM. PLAN. 1 (Oct. 1969); *Id.* (July 1971).

Also, many women cannot or will not use various contraceptive methods because of their possible side effects. Possible side effects of oral contraceptives include changes in carbohydrate metabolism, blood pressure, adrenal function, nervous system function and liver function. Oral contraceptives can cause nausea, dizziness, thrombosis, pulmonary embolism, idiopathic thromboembolic disease, candida albicans, benign hepatoma, amenorrhoea, chorea, and chloasma. I.U.D.'s can cause bleeding, pain, infections and perforation of the uterus. Also many are expelled automatically from the woman's uterus. S. N. Preston, *The Oral Contraceptive Controversy*, 111 AM. J. OBS. AND GYN. 994 (1971); S. J. Segal, *supra*; L. Poller, *et al.*, *Oestrogen-Progestogen Oral Contraception and Blood Clotting: A Long Term Follow Up*, 4 BRIT.MED.J. 648 (1971); D. Riddock, *et al.*, *Chorea and The Oral Contraceptive*, *Id.* at 217; *Amenorrhea After The Pill*, *Id.* at 510; H. J. Tatum, *Intrauterine Contraception*, 112 AM. J. OBS. AND GYN. 1000 (1972); P. E. Sartwell, *et al.*, *Thromboembolism and Oral Contraceptives: An Epidemiologic Case-Control Study*, 90 AM. J. EPIDEM. 365 (1969); W. G. Povey, *Intrauterine Contraception: An Overview*, 51 POSTGRAD. MED. 221 (1972); J. K. Baum, *et al.*, *Possible Association Between Benign Hepatomas and Oral Contraceptives*, LANCET 926 (Oct. 1973); D. Catterall, *Candida Albicans and the Contraceptive Pill*, LANCET 830 (Oct. 1966).

of the word.[94] It should be noted that disabilities resulting from "voluntary" abortions, however minimal the disability may be, are not compensable under the old or new version of Section 2626. Appellees willingly concede—more as a matter of optimistic faith than researched fact—that most births in this country are desired. But Appellant may not conclusively presume that all births or all pregnancies are voluntary. *Cf. Schlesinger v. Wisconsin,* 270 U.S. 230 (1926) (conclusive presumption that gift made within six years of death was made in contemplation of death); *Stanley v. Illinois,* 405 U.S. 645, 654 (1972) (possible fact that "most unmarried fathers are unsuitable and neglectful parents" would not entitle state to deprive individual father from hearing re custody of his child).

Appellant now covers other disabilities resulting from "normal biological functions," such as disabilities resulting from orthodontic treatment, sex change operations, or those for hair transplants to eliminate baldness or plastic surgery to change the shape of the nose. The fact that pregnancy is a normal biological function is therefore irrelevant to coverage under the California program. It strains coherence, however, to

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[94]To deny benefits to a woman who refused to obtain an abortion for religious reasons would present severe constitutional problems under the First Amendment. Also, many women are fearful of obtaining an abortion to terminate a "voluntary" pregnancy because complications can arise. Abortion can cause infection, hemorrhage, renal failure, bacterial shock, and even death. EASTMAN AND HELLMAN, *supra,* note 77, at 530. In New York in 1970, 8.1 percent of all abortions had complications arise. U.S. DEP'T OF HEW, PUBLIC HEALTH SERVICE, THE EFFECT OF CHANGES IN THE STATE ABORTION LAWS 27 (1971).

refer to most of the trauma suffered in childbirth as "normal" except in the statistical sense. It is also statistically normal to get two colds per year, but both the injuries suffered in childbirth and respiratory ailments are deleterious to health and therefore not "normal" from a viewpoint of health. See note 20, *supra*.

3. Labor force participation patterns of mothers of young children cannot justify differential treatment of disabilities caused by pregnancy and parturition.

Appellant contends that the exclusion of disabilities caused by pregnancy and childbirth from program coverage is justified because 50% of the working women who give birth do not return to work within the next year following delivery. As Appellees have previously discussed, however (pp. 13-18, *supra*) the program now covers all disabilities without regard to the disabled individual's present or likely future labor force status. Payments for the deceased, to the unemployed disabled, and the aged, coupled with the favored benefit status given part-time workers, illustrate California's lack of concern for future connection to the labor force or return to one's old job, a disregard that may distinguish the California program from employer-financed programs. In any event, mothers of young children who do leave the labor force, do not do so permanently, but instead only interrupt their labor force participation.

A substantial number of women with very young children participate in the labor force. Of women with children under the age of three years, 41.9% had

some labor force experience during 1969.[95] About 27% of all women with children under three years old hold fulltime jobs, as compared with almost twice that percentage for all women between the ages of 18 and 64.[96] What the statistics show is that many women do leave the labor force for a few years, but that they return by the time their children enter school.[97] As the Department of Labor concluded: "A very small proportion of women leave the labor force permanently at this time." *Women's Bureau, Dep't of Labor, Women Workers Today* 4 (1972).

That fully half the women who give birth return almost immediately to the labor force is a startling development itself and may represent a trend toward

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[95]Waldman and Gover, *Children of Women in the Labor Force*, U.S. DEP'T OF LABOR, MONTHLY LABOR REV., Table 2, at 21 (July, 1971).

[96]In 1969, almost two-thirds (66.3%) of the 41.9% of the women with children under three years old were working fulltime, *i.e.*, 27% of all women with children under three years old. *Id.* at Table 2, at 21.

In September, 1973, 52.3% of all women between 18-64 years old were in the labor force, as compared to 51.1% of women in September, 1972. U.S. DEP'T OF LABOR, WOMEN'S BUREAU, WOMEN IN THE LABOR FORCE (Nov. 1973).

[97]In 1972, 26.9 percent of the mothers with children under three years old were in the labor force; 36.1 percent of mothers with children three-five years old worked; 50.2 percent of women with children 6-17 years old were in the labor force. Hayghe, *Labor Force Activity of Married Women*, U.S. DEP'T OF LABOR, MONTHLY LABOR REV., Table 4, at 34 (April, 1973).

See also, Waldman and Gover, *supra* note 95, at 19; SPECIAL LABOR FORCE REPORT SUMMARY OF THE DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, MARITAL AND FAMILY CHARACTERISTICS OF WORKERS (Sept. 1971). It should be noted that the labor participation rate of women with children under six years old was 38% when a female relative over eighteen was present in the household (as compared to the 30% participation rate when no such person was present) indicating the need for child care services for working women. Waldman and Gover, *supra* note 95, at 24.

even greater participation in the near future. Far fewer women with young children worked even five to ten years ago.[98] More women work today than ever before, and increased labor force participation is even more marked among women with young children.

These changes in labor force participation have not yet changed the stereotypes that employers may have regarding female employee absenteeism and turnover rates,[99] and may result in discrimination against women who remain in the work force. As the *Eco-*

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[98]The trend for more women with young children to work is evident from the following statistics: From 1950-1971, the labor force participation rate for women with children under six years old increased from 12 to 30 percent. DEP'T OF LABOR, WOMEN'S BUREAU, ECONOMIC REP. OF THE PRESIDENT 93 (1973). In 1960, 18.6% of married women with children under six years old were in the labor force; in 1965, 23.3% were working; in 1972, 30.1% of married women with preschool children were in the labor force. MARITAL AND FAMILY CHARACTERISTICS OF WORKERS, *supra* note 97. Among married women aged 20-24 years old with children under six, there was an increase of 325,000 workers (82% increase in labor force participation rate) from March, 1966 to 1972: for married women 25-34 years old with children under six years old, there was an increase of 372,000 workers in the same period (98% labor force participation rate increase). Hayghe, *supra* note 97, Table 3, at 34.

In 1970, in California, 31% of the mothers with pre-school children were in the labor force.

[99]During the 1960's, the turnover rate among women altered and women employees no longer increase the level of total quits. Armknecht and Early, ***Quits in Manufacturing: A Study of Their Causes***, U.S. DEP'T OF LABOR, MONTHLY LABOR REV. 31-37 (Nov. 1972). In a more recent study on women's quitting rates. Armknecht and Early again concluded, "Over the last 14 years their upward pressure on quits has been reversed and now they exhibit lower than average propensities to quit." Armknecht and Early, ***Manufacturing Quit Rates Revisited: Secular Changes and Women's Quits***, U.S. DEP'T OF LABOR, MONTHLY LABOR REV. 58 (Dec. 1973).

This trend was already noticeable in 1968 where, in examining factory workers, the available statistics indicated the net differences in job-leaving of men and women were small: 4.4 (men)

nomic Report of the President, 1973 comments (at 106):

> There is clearly prejudice against women engaging in particular activities. . . . Employers also may have formulated discriminatory attitudes about women, exaggerating the risk of job instability or client acceptance and therefore excluding women from on-the-job training which would advance their careers.
>
> In fact, even if employers do estimate correctly the average job turnover of women, women who are strongly committed to their jobs may suffer from "statistical discrimination" by being treated as though their own behavior resembled the average . . .

Appellant has miscalculated the effect of childbirth on labor force participation by failing to consider current trends toward continued participation immediately following childbirth and by failing to consider the fact that women who do leave for a few years return to the labor force.

More importantly, however, Appellant is constitutionally prohibited from discriminating against the entire plaintiff class on the basis of the characteristics of half of them. Even if 50% of all women giving birth left the labor force permanently, and even if future labor force participation were relevant to eligibility for benefits in California, Appellant would

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to 5.2 (women) separations. Separations included quits, layoffs, and other involuntary separations. The gap was already lower than in a previous study done in 1955. WAGE AND LABOR STANDARDS ADMINISTRATION, DEP'T OF LABOR, FACTS ABOUT WOMEN'S ABSENTEEISM AND LABOR TURNOVER 2 (Aug. 1969).

still be prohibited from excluding all birth-caused disabilities from coverage on the basis of a conclusive presumption that women who give birth will not return to work.

This Court has invalidated statutory classifications bottomed in such conclusive presumptions. *Stanley v. Illinois,* 405 U.S. 645 (1972); *Frontiero v. Richardson,* 411 U.S. 677 (1973); *Cleveland Board of Education v. LaFleur,* 42 U.S.L.W. 4186 (1974); *Vlandis v. Kline,* 412 U.S. 441 (1973); *Carrington v. Rash,* 380 U.S. 89 (1965); see also *Reed v. Reed,* 404 U.S. 71 (1971). Conclusive presumptions which act to deny an individual the right to controvert the exclusionary presumption, and which therefore deny an individual substantial rights, have been invalidated even where the presumption was assumed to be correct in the vast majority of cases. Thus in *Stanley* it was assumed that most unwed fathers might be unfit parents; in *Carrington* it was assumed that most servicemen had no intention to remain in Texas and were therefore not bonafide residents; in *Frontiero* it was assumed that most wives are economically dependent on their husbands, while most husbands are not dependent on their wives for over half their support. In this action, however, Appellant justifies an exclusion from benefits often desperately needed for economic survival on the basis of a sex stereotype admittedly inapplicable to over half the class thereby excluded. The classification not only denies these women equal protection of the laws by inquiring into their labor force status when men are not similarly questioned (*Cf.*

Frontiero v. Richardson, supra) but also denies women within the class due process of law by operation of a demonstrably arbitrary conclusive presumption. The disqualification from benefits of all women disabled by pregnancy or childbirth can in no way be justified by a different pattern of labor force participation true of only half the women involved.

C. The administrative convenience of excluding all claims on the assumption that women and their physicians will otherwise attempt to defraud the program cannot justify the exclusion from coverage of all disabilities caused by pregnancy and childbirth.

Appellant *admits* that "it is possible to distinguish between maternity leave and the shorter period of time a female employee is actually unable to work because of childbirth," (Appellant's Br. at 20) but contends that women, with the cooperation of their doctors, would make claims for the longer period. The apparent justification for the total exclusion from benefits of actual birth-related disabilities is thus reduced to one of preventing fraud by classification rather than by the individualized treatment which is accorded each and every other disabled person in the California program.

It may well be that there will be some confusion among doctors, as well as employers and employees, over the distinction made in the California program between medical disability of the woman and the sociological and psychological decision to stay at home for some period of time for the welfare of a newborn child. If such confusion exists, Appellant can issue

guidelines to physicians regarding eligibility for disability insurance benefits. Appellant may not lightly presume that the medical profession will nevertheless ignore such guidelines. As Mr. Justice Burger remarked recently:

> The vast majority of physicians observe the standards of their profession, and act only on the basis of carefully deliberated medical judgments relating to life and health.
>
> *Roe v. Wade,* 410 U.S. 113, 208 (1973) (concurring opinion).

There is no reason to believe that physicians would not comply with any guidelines that Appellant might promulgate regarding permissible bases for finding disability in this context.

Even assuming that continuing problems would be presented regarding the period for which a woman is truly disabled from performing her customary or regular work, Appellant could not constitutionally exclude this entire class of claimants simply in order to avoid individualized consideration of the extent of disability involved. "[A]dministrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law." *Cleveland Board of Education v. LaFleur* ___ U.S. ___, 42 U.S.L.W. at 4191 (1974). As this Court stated in *Reed v. Reed,* 404 U.S. 71 (1971), to "give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection

Clause of the Fourteenth Amendment." *Id.* at 76. *See also, Carrington v. Rash,* 380 U.S. 89, 96 (1965). It cannot even be argued here, as the Court noted it might be in *Stanley v. Illinois,* 405 U.S. 645 (1972), or in *Carrington,* that the great majority of those excluded by the statute would be excluded after individual consideration as well. For the State readily admits that any individual assessment would show that the overwhelming majority of women *are* disabled by injuries suffered in childbirth for some period of time. The *only* question is whether that disability endures for two weeks, two months, or two years. As this Court said in *Stanley,* "Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure . . . explicitly disdains present realities . . . it needlessly risks running roughshod over the important interests of [the individual]." 405 U.S. 645, 656-57. Here, as in *Stanley,* the presumption is contrary to fact. Unlike *Stanley* or *Vlandis v. Kline,* 412 U.S. 441 (1973), the presumption is not only contrary to fact some of the time, it is contrary to fact *all* of the time.

Nor can Appellant justify its approach by its legitimate interest in reducing fraudulent claims. Even if it were proven that women would purposely make false claims, and that doctors would intentionally disregard Appellant's guidelines, a very dubious possibility, the arbitrary exclusion of *all* claims, *all* of which have *some* validity is, to say the least, overbroad. *U.S. Dep't of Agriculture v. Moreno,* 413 U.S. 528, 535-36 (1973); *Vlandis v. Kline,* 412 U.S. 441 (1973); *U.S. Dep't of*

Agriculture v. Murry, 413 U.S. 508 (1973); *Cf. Cleveland Board of Education v. LaFleur* ___ U.S. ___, 42 U.S.L.W. 4186, 4190 (1974); *Shelton v. Tucker*, 364 U.S. 479 (1961).

D. The cost of extending coverage to disabilities caused by pregnancy and childbirth has been grossly exaggerated by appellant, but in any event cannot justify discrimination on the basis of sex.

Appellant contends that women are more costly to insure than men even when birth-caused disabilities are excluded from coverage, and that this alleged cost differential justifies continued exclusion from coverage of such disabilities. Appellant further claims that the cost of extending coverage would be exorbitant, and that the incremental cost of extending equal treatment to these women can justify continued discrimination against them. These contentions are erroneous both in fact and in law.

1. The present claims experience of women in the California program is statutorily and constitutionally irrelevant, but in any event does not support appellant's claim that women are more costly to insure.

California's use of the pooled fund concept of insurance renders irrelevant for every purpose, the possible differential cost of insuring particularly high risk groups of employees or costly disabilities.[100] California has never attempted to limit benefits or raise the contribution rate for a group which is known to be relatively more costly to insure. For example, the

[100]See pp. 9-13, *supra*.

Legislature has known for almost a decade[101] that the unemployed disabled and low paid workers have longer and more frequent periods of disability, yet no change in eligibility, benefit rates, or contribution rates has ever been made for these groups. Actuarial considerations are not used. Therefore, even if women were more costly to insure as a class than men, the fact would be irrelevant to coverage under the California program and could not justify the exclusion from coverage of disabilities caused by pregnancy and childbirth.

Nor would the Equal Protection Clause be complied with if Appellant could show that women are actuarially more expensive to insure than men. The lesson of *Reed, Frontiero,* and *LaFleur* is that courts will no longer tolerate sex-averaging as a justification for discriminating against individuals or subgroups on the basis of sex. The Equal Protection Clause requires not that treatment be "equal" in the sense of some monetary ratio of costs and benefits, *cf. San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973), but rather that classifications be based upon a difference having some fair and substantial relation to the objective of the legislation. As Appellees have previously set forth in detail, the California program, far from attempting to equalize cost/benefit ratios among various classes of employees, statutorily ensures that lower paid workers will get proportionally

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[101]See JOINT COMMITTEE ON UNEMPLOYMENT COMPENSATION DISABILITY INSURANCE, *supra* note 7, at 16-19, 37-41.

more in benefits than they contribute to the fund. See p. 19, *supra.*

In any event, while a higher cost for insuring women could, therefore, not justify the discrimination against individual women claimants involved here, the plain fact is that sex is not a significant determinant of program costs. Studies conducted by Appellant's own department reveal that sex has almost nothing to do with duration of disabilities or with average disability days lost each year.[102] Income and age are far better explanatory variables than sex in predicting disability experience.[103] As the Assembly's Joint Committee concluded:

> The sex of the claimant is a factor of very minor, if any, importance in influencing average duration when other factors are held constant. . . .[104]

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[102]Dept of Employment Report 1200 No. 12, reprinted in *Id.* at 121-130, discussed at 51-52. The report yields the following data for 1964:

	Average Number of Weeks Per Claim by Age				
	Total	Under 45	45-54	55-64	65 and over
Males earning less than $4000	8.1	6.5	8.6	10.9	13.0
Females, under $4000/yr	8.0	7.1	8.6	9.7	12.8
Males over $4000/yr	6.5	5.2	6.7	8.3	11.0
Females, over $4000/yr	6.9	6.2	7.0	8.2	11.9

[103]*See generally,* HEW, Time Lost From Work Among the Currently Employed Population, United States—1968 (Vital and Health Stats. Series 10, No. 71), Table B, at 5-7. Average days of work lost due to disability was higher for women on the whole in 1968, but lower in 1963-64, 1964-65, and 1965-66. *Id.*, at 4. Work loss days varied directly with income, education, and age. For each educational group, moreover, persons with lower income had more work loss.

[104]Joint Committee on Unemployment Compensation Disability Insurance, *supra* note 7, at 43.

Even when income and age are not held constant, the most recent experience of Appellant's Department is that women have a lower duration average, both for basic benefits and hospitalization than do men.[105] In short, Appellant's contention that women cost more to insure than men is wrong.

Appellant contends that the fact that women as a class contribute 28% of program funds and receive 38% of program benefits demonstrates that they are more costly to insure, adding that California has a right to tie benefits received to contributions made.[106] Women receive more than they contribute, however, not because they have more costly disabilities, but rather because (1) average wages for women are only 60% of those for men, and (2) California's statutory scheme ensures that lower paid workers will get paid more than they contribute for the same disability experience. Women constitute approximately 40% of the California labor force.[107] Their average wages are only 60% of those of men.[108] Simple arithmetic yields the expected result that any group with these characteristics will contribute only about 28% of the funds

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[105]The average duration of paid claims in 1971 was 8.2 weeks for men and 8.1 weeks for women. Average hospitalization was 8.1 days for men and 7.0 days for women. Women have a slightly greater frequency rate, however. H.R.D., California Disability Insurance Terminated Claims: 1971 (Report 1031A, May 22, 1972), Tables 2, 6.

[106]Appellant's Br. at 26.

[107]Milliman and Robertson, Inc., *supra*, note 6, Table 3; *see also* CALIF. COMM'N. ON THE STATUS OF WOMEN, REPORT: CALIFORNIA WOMEN 11 (1974).

[108]See WOMEN'S BUREAU, DEP'T OF LABOR, ECONOMIC REPORT OF THE PRESIDENT 106 (1973).

of the California program.[109] Appellant himself has estimated that women receive approximately 85% of the average weekly benefit amount that men receive.[110] Assuming this figure to be accurate, the multiplier built into the California program for all persons (regardless of sex) earning what women earn is approximately a ratio of 85 to 60, or 1.417.[111] Given an *equal* disability experience, therefore, one would expect that women, contributing 28% of program funds, would withdraw 39.76% of the benefits. In fact, women receive 38.3% of all benefit payments.[112] This disparity in benefits as compared to contributions results solely from California's decision to structure its benefit scale so as to pay proportionally more to lower paid workers, *not* from the duration or frequencies of disabilities among women. (CAL. UNEMP. INS. CODE §2655.)[113]

The fact that women receive more in benefits than they contribute is not only irrelevant to the program and its compliance with the equal protection clause, as well as to the cost of insuring women as a class, but also reflects the sex discrimination which contin-

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[109]If men earn x wages and constitute 60% of the work force, and women earn $.6x$ wages and constitute 40% of the work force, total contributions in a flat-rate contribution system will be $.6(x)$ plus $.4(.6x)$, or $.84x$. Women contribute $.24x$, or about 28% of the total.

[110]See Appellees' Addendum to this Brief, Statistician's Notes.

[111]This figure assumes that the benefit to wage ratio is the same as the benefit to contribution ratio. The figure may be slightly exaggerated because of the limit on taxable wages in the California program.

[112]HRD, Calif. Disability Insurance Terminated, Claims 1971, *supra* note 105, at Table 2.

[113]Women still receive slightly lesser benefits than their percentage of the labor force might lead one to expect.

ues to pervade the job market, ensuring that women will continue to earn less than men in comparable jobs and will be excluded from many better paying occupations. Appellant cannot justify the exclusion challenged in this action upon such a basis.

2. Appellant grossly exaggerates the cost of extending coverage to disabilities caused by pregnancy and parturition.

The crux of Appellant's argument is that it costs too much to extend the equal protection of California's disability program to women. As Appellees discuss in the next part of this Brief, the spectre of increased costs has never been an acceptable justification for arbitrary or invidious classification. Nor may it be so here. Appellant's attempt to impress the Court with a large cost estimate nevertheless lacks candor, for Appellant's own statistics and others readily available to him belie Appellant's contentions.[114]

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[114]In the *Armendariz* Appellees' Points and Authorities in Support of Petition for Writ of Mandate, included in the record herein, Appellees included as exhibits two estimates made by Appellant of the cost of extending coverage for a limited period. In their Interrogatories, Appellees asked Appellant to state the source of his estimates in detail. After providing certain data, Appellant noted that his estimate of the cost of extending coverage on the same basis as provided for other disabilities was contained in a separate report of Appellant's department, numbered 1972 T#3, and offered to provide Appellees with copies of said document. Answer to Interrogatory No. 15, at 13. Appellant subsequently provided Appellees with this report and the department statistician's longhand notes regarding the basis for his estimates. Through inadvertence, neither Appellant nor Appellees filed a copy of this report and its accompanying notes with the District Court. As a result it was never made part of the record in this action. Because of the importance of this report as a basis for Appellant's current estimate, Appellees now include a copy of this report and the statistician's notes as an Appellees' Addendum to this Brief.

Appellant's estimate of a cost of $120.2 million[115] is based on a number of assumptions and consists of a number of different components. The cost of covering complications of pregnancy, which was relevant before the District Court, alone constituted almost $12,000,000 of this total.[116] The cost of covering live births, which represents most of the remaining estimate of $108 million,[117] is based on two essential statistics: the birth rate and the average duration of disability.[118]

In his Answers to Plaintiffs' Interrogatories, which are part of the record herein, Appellant states that his original estimate that 200,000 women would be affected per year was based on a birth rate of 18.3 per thousand in 1970, and that his present estimate

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[115]Appellant now claims that the $120.2 million figure was based on an estimated duration of 13 weeks, and that his revised estimate of 15 weeks justifies a figure of $131 million. As the statistician's notes make clear, however, a 15 week period has always been assumed, and formed the basis for the $120.2 million figure. See Appellees' Addendum to this Brief, Statistician's Notes, at 6. See also, Answer to Interrogatory 14 (part 4).

[116]An additional 6.0 hospital days and 7.0 weeks of disability was estimated for complications in 22,000 births, yielding costs of $1,584,000 for hospital benefits and $9,695,840 for weekly benefits at $62.96 per week. See Appellees' Addendum to this Brief. Prior estimates were $14.9 million for complications. Answer to Interrogatory 11.

[117]Costs of $20,013 were estimated for coverage of maternal deaths, $292,360 for disabilities resulting from fetal deaths, and $2,003,639 for disabilities resulting from abortions. See Appellees' Addendum to this Brief. On the validity of this latter figure, see note 128, *infra*.

[118]These cost estimates also depend on the duration of hospitalization, the average weekly benefit, and the percentage of all women covered by the program. Appellees have assumed these estimates to be correct.

of 140,000[119] women is based on a 1971 birth rate of 17.2 per thousand.[120] The 1972 birth rate in California, however, was only 14.9 per thousand, with the 1973 rate estimated at an even lower 14.5 per thousand.[121] This precipitous drop in the birth rate has taken place on a national level,[122] and has led to concern that we have plunged beneath the birth rate needed even for zero population growth.[123] Appellees have no way to predict how many covered childbirths will take place in California in 1974, but it seems fairly safe to assume that far fewer than Appellant's estimate of 111,000 covered births will take place. An estimate of 100,000 is generous.[124]

Appellant has consistently based his cost estimates upon a fifteen week average duration of disability.

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[119]See Appellees' Addendum to this Brief, Report 1972 T #3; Answer to Interrogatory 11, at 9.

[120]Answer to Interrogatory 11, at 9. The actual 1971 birth rate was 17.3 per thousand population for the United States, but only 16.3 for California. See notes 121 and 122, *infra*.

[121]Dept. of Health, Vital Statistic Section, State of California. The 1972 rate represents a sharp drop from 16.3 in 1971, 17.9 in 1966, and 23.3 in 1961.

[122]The birth rate for the United States was 23.3 in 1961, 18.4 in 1966, 17.3 in 1971, and 15.6 in 1972. National Center for Health Statistics, HEW, *Monthly Vital Statistics Report; see also* BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES FOR 1972.

[123]*Caution on Zero Growth: Birth Rate at Record Low*, S.F. Chronicle, March 3, 1973, at 4, col. 1, quoting Census Bureau reports. According to the Chronicle article, the fertility rate fell in 1972 to 2.03 children per family, significantly below the replacement level of 2.1 children.

[124]The number of births dropped 9% nationally from 1971 to 1972. *Id.* Since Appellant's estimate of 111,000 covered births (see Appellees' Addendum to this Brief) is based on a 1971 estimate of 17.2 and since the birth rate dropped in California to 14.5, as compared to a drop of 17.3 to 15.6 nationally, it is safe to assume at least a 10% drop in births in California.

He bases this estimate upon a small sample of unprocessed claims received immediately after newspaper coverage of the District Court's decision in this action and on varying estimates of disability given by doctors responding to a "survey" conducted by Appellant's medical director. (See Appendix to Brief for Appellant.) Appellant's sample, however, is certainly not random.[125] Moreover, even if the sample were representative of *initial* claims, it would in no way be representative of *processed* claims, which depend in part on Appellant's examination of the validity of the period claimed. If some ambiguity persists in the minds of obstetricians—most of whom have had little exposure to the disability insurance program's standards—regarding the proper definition of medical disability under the California program, Appellant can surely issue guidelines illustrating what are valid and invalid considerations in determining the period of compensable disability.

The survey conducted by Appellant's medical director, far from giving credence to Appellant's argument, directly supports that of Appellees. Of the three groups of doctors whose views were solicited, the professors of obstetrics and gynecology on the average predicted a total prepartum and postpartum disability period of 7 weeks. Doctors certified by the American Board of Obstetrics and Gynecology reported on the average a prediction of 8 weeks, while

[125]The sample is based upon persons already disabled by pregnancy at the time of newspaper coverage of the District Court's decision. Women with a longer duration of disability are therefore likely to be overrepresented in the sample.

Appellant's own independent medical examiners, who actually assess the validity of claims, on the average, predicted a period of 6⅔ weeks.[126]

The doctors surveyed by Appellant thus, on the average, concur with the recent Policy Statement of the American College of Obstetricians and Gynecologists, quoted in full at p. 59, *supra,* which sets the predicted period of disability at six to eight weeks. Coincidentally, the average duration of all claims paid in California is slightly longer—8.2 weeks—than this period.[127]

Assuming, as Appellant does, average weekly benefits of $62.96 for women, 100,000 covered births, and a seven week duration of disability, Appellant's estimate of $108 million for basic benefits is reduced to $44,072,000. Assuming Appellant's estimate of 4.0 hospital days to be correct, another $4.8 million would be expended for hospitalization benefits, for total costs of $48.9 million.[128] These costs represent a 12%

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[126]See Appendix to Brief for Appellant, *passim*. The averages presented were constructed by averaging predictions within each category. A prediction of variable duration, *e.g.* 4-6 weeks, was treated as an average of its extremes, *e.g.* 5 weeks.

[127]H.R.D., California Disability Insurance Terminated Claims: 1971 (Report 1031A, May 22, 1972), Table 6.

[128]This figure does not include Appellant's estimate of $2 million for disabilities caused by abortions. Many women are not hospitalized for abortions, and disability rarely extends over three days in the absence of complications (which may be compensable under Section 2626.2). Appellant's estimate of one week's duration was based in part on the questionable assumption of mental anguish on the part of all women having abortions. See Appellees' Addendum to this Brief, Statistician's Notes, at 7-8. The cost of covering disabilities caused by abortions, when the disability is not the result of a compensable "involuntary or abnormal" complication, would be negligible. The $108 million estimate also included small amounts for maternal and fetal deaths. See note 117, *supra*.

increase over present expenditures, and could be funded by increasing the taxable income base or by increasing the contribution rate to 1.12%, thereby increasing total maximum annual individual contributions from $90 to only $100.80.[129]

This modest cost increase, which is comparable to the experience of private disability insurers,[130] cannot justify California's discrimination against women on account of their sex, by means of a classification that is irrational, arbitrary and based on sex stereotypes.

3. Incremental cost cannot justify discrimination on the basis of sex.

Appellant argues that the extra expense of providing coverage for disabilities caused by pregnancy and childbirth justifies excluding such disabilities from coverage. The cost of affording equal protection of the laws can never be considered an "extra" cost where the Constitution requires the inclusion of the excluded class within the State's program. The State may protect the fiscal integrity of its programs, but not by making invidious distinctions between classes

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[129]Even if Appellant's cost estimates were serendipitously accurate, the District Court pointed out that the entire cost increase could be met by requiring workers to contribute an additional amount of approximately 0.364% of their salary, thus increasing the maximum contribution by about $2.80 per month for those in the highest wage bracket. 359 F.Supp. at 798.

[130]Aetna Insurance and casualty Company provided the Citizens' Advisory Council on the Status of Women with an estimate that such coverage, with the same duration as exists in the California program (seven day waiting period, 26 week maximum coverage), would increase costs by 10%. Citizens' Advisory Council on the Status of Women, Information from Insurance Industry Relating to Coverage of Childbirth in Health Insurance and Temporary Disability Insurance, June 9, 1971, at 2.

of its citizens. *See, e.g., Shapiro v. Thompson,* 394 U.S. 618, 633 (1969). Appellant has constitutionally acceptable alternatives for reducing overall program costs; the convenience of discriminating on the basis of sex cannot render the classification constitutional.

This Court has consistently rejected justification of otherwise irrational and arbitrary classifications on the basis of cost alone. In *Frontiero v. Richardson,* 411 U.S. 677 (1973), for example, this Court rejected the Government's argument that it would reduce administrative costs to presume conclusively that wives of male members of the military are financially dependent upon their husbands, while requiring that female members establish dependency in fact for purposes of obtaining certain housing and medical benefits. The euphemism of "administrative convenience" has long been used to cloak cost justifications in a mantle of discretion. *(cf. Schneider v. Town of Irvington,* 308 U.S. 147 (1939)), but this Court has not hestitated to reject such contentions even when the costs of compliance have been substantial. *Cf. Goldberg v. Kelly,* 397 U.S. 254 (1970); *Fuentes v. Shevin,* 407 U.S. 67, n.22 (1972); *Bell v. Burson,* 402 U.S. 535 (1971).

Moreover, cost justifications are often the "cloak" for other, nonfiscal considerations. Implicit in every incremental cost decision is a value judgment concerning the need for or merit of paying for the addtional service or benefit. Appellant does not assert that disability due to normal delivery is more costly than disabilities now covered by the disability insurance pro-

gram,[131] or that reasonable alternatives to exclusion are not available, yet he seeks to justify his exclusion on the ground that it costs "too much." Under these circumstances, the danger is that the unexamined value judgment which led to that conclusion is based upon stereotypes concerning women. Notions that women do not really need the benefits (See Appellant's Brief, p. 19, 25-26), that women are not serious members of the workforce,[132] and that women with children belong in the home, can be the unarticulated bases for an unwillingness to cover their disabilities.

Appellant relies on *Dandridge v. Williams,* 397 U.S. 471 (1970) and *Jefferson v. Hackney,* 406 U.S. 535 (1972) for the bald proposition that a far lower standard of rationality should be required of classifications in public assistance programs so long as those classifications promote fiscal economy. California's working people, who contribute a portion of their salary to finance the disability insurance program and who rely on *no* "public assistance" whatsoever for funding of the program, would be surprised to learn that Appellant regards the disability insurance program as a welfare program. This distortion notwithstanding, this Court has clearly "rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or

[131]As the district court noted, "Unfortunately, it is impossible to determine if the cost of including these disabilities is substantially greater than the cost of including other disabilities, because, according to defendant, no statistics are available indicating the cost to the program of paying benefits on account of various disabilities presently covered." 359 F.Supp. at 798.

[132]*See, e.g.,* note 34, *supra.*

as a 'privilege.'" *Graham v. Richardson,* 403 U.S. 365, 374 (1971). "Citizens may not be compelled to forgo their constitutional rights because officials fear public hostility or desire to save money." *Palmer v. Thompson,* 403 U.S. 217 (1971). The requirement that classifications be based on rational differences bearing a fair and substantial relation to the object of the legislation has been applied no less vigorously in the field of public assistance programs than in other areas of the law. *See, e.g., U.S. Dep't of Agriculture v. Moreno,* 413 U.S. 528 (1973); *U.S. Dep't of Agriculture v. Murry,* 413 U.S. 508 (1973); *New Jersey Welfare Rights Organization v. Cahill,* 411 U.S. 619 (1973); *Graham v. Richardson,* 403 U.S. 365 (1971); *Shapiro v. Thompson,* 394 U.S. 618 (1969). *Dandridge* and *Jefferson* do not stand for the proposition that any class of persons may be disadvantaged solely for the purpose of saving money, but rather require that the disadvantaged class be selected on rational grounds *apart* from cost justifications.

Dandridge and *Jefferson* are certainly inapplicable in the present context, where the classification created is itself subject to a more rigorous scrutiny than that applied in those cases. *Reed v. Reed,* 404 U.S. 71 (1971). This action involves discrimination on the basis of sex. Were classifications based on sex not subject to scrutiny in cases of monetary discrimination, *Reed* and *Frontiero* would not have been decided as they were.[133]

[133]Because California makes no distinctions on the basis of actuarial principles, no question is here presented as to whether a medical insurance plan might make such distinctions based on

If California wishes to limit the costs of its program, it may constitutionally do so by excluding or limiting all claims in excess of certain amounts, or by any other constitutional means, but it cannot exclude a whole class of disabled persons from coverage because of some stereotyped prediction that all pregnancy- and childbirth-caused disabilities will be of inordinate length or expense, nor because it is simply cheaper to exclude all such disabilities. Under the circumstances, the exclusion of such disabilities is as irrational and invidious as the exclusion of indigent children from the schools to reduce education expenditures. *Cf. Shapiro v. Thompson,* 394 U.S. 618, 633 (1969). There exists no distinguishing feature of these disabilities which would warrant singling them, and the women who have them, out from coverage for the purposes of economy. Preservation of

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part on classification by sex. Appellees simply note that, to the extent state action were involved, the classification would be subject to scrutiny to ascertain whether the classification used was statistically explanatory or whether non-sex-based classifications might better explain predicted morbidity rates. And *see* Note, *Sex Discrimination and Sex Base Mortality Tables,* 53 B.U.L. Rev. 624, 650-653 (1973) advocating "unisex" mortality tables. "Certain classifications, however statistically valid, are unacceptible from a policy point of view. Race is one of them; and this note argues that sex is another." *Id.* at 653. *See also Hearings before the Joint Economic Committee,* 93d Cong. 1st Sess. at 154 (1973) Statement of Hon. Herbert S. Denenberg, Commissioner of Insurance, State of Pennsylvania, in which he states: "There are some convenient bases of classification which the insurance industry does not now use. One is race. Although Blacks have a shorter life expectancy than whites, no classification based on race is used. Such a classification is considered to be unacceptible from a public policy standpoint. . . . With the changes in the economic, social and legal position of women, the once homogeneous classification of women has become less meaningful. It is clearly time to force the insurance industry to reevaluate all sex classifications of the insurance business." *Id.* at 154.

the fiscal integrity of government benefit programs is a commendable goal, even when the program is financed by the recipients themselves, but savings may not be achieved by invidious exclusions of persons guaranteed by the Constitution the equal protection of the laws.

CONCLUSION

For the reasons stated above, the decision of the Three-Judge District Court for the Northern District of California should be affirmed and the California Disability Insurance Program's exclusion of benefits for disabilities resulting from pregnancy and childbirth should be declared unconstitutional.

Respectfully submitted,

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(Appendix Follows)

State of California
Department of
Human Resources Development
1972 7 43

Employment Data and Research
September 26, 1972

CALIFORNIA DISABILITY INSURANCE PROGRAM

The Effect on Benefit Costs of Eliminating the Exclusion of Pregnancy Benefits in Section 2626

Estimated Full Effect in a Year Like Calendar Year 1972, Accrual Basis

(dollar amounts in millions)

Item	Present Statute	Including Pregnancy	Increase Amount	Increase Percent
Net worker contributions accrued	$339.0	$339.0	$	%
Net benefits incurred	330.1	450.3	120.2	36.4%
Basic	300.0	412.6	112.6	37.5%
Hospital	30.1	37.7	7.6	25.2%
Net benefits as a percentage of net contributions	97.4%	132.8%	---	---
Claimants receiving disability insurance benefits	552,000	698,000	---	26.4%

Based on the pregnancy benefit experience of disability insurance programs in New Jersey and Rhode Island, it is estimated that one-third of the California live births expected during 1972 will be to workers filing valid disability insurance claims. Based on data from insurance companies offering policies with pregnancy provisions to California residents, it is assumed that one out of every five live births to qualified claimants involve some form of prior complication of pregnancy. Another assumption is that therapeutic abortions performed under California laws would become compensable disabilities.

Of the estimated 146,000 women who would benefit from this proposal in a year like calendar year 1972, nearly 32,000 will have abortions and will receive an estimated $2.6 million of the $120.2 million in added disability insurance benefits.

The above estimate includes benefit costs for cases of maternal and fetal deaths, the number of such cases computed from rates published in the 1971 California Statistical Abstract. Abortion rates were supplied by the Epidemiology Unit of the Bureau of Maternal and Child Health in Berkeley.

DHR's claims examiners determine the reasonableness of the duration of any disability with the aid of tables of disability durations developed, and periodically reviewed, by the Medical Director. A tentative medical yardstick developed for pregnancy cases formed the basis of estimating the total number of weeks of pregnancy benefits to be compensated under this proposal.

Legislation enacted by the 1971 Legislature effective April 1, 1972, increased the maximum weekly benefit amount from $87 to $105 and provided financing for the increase by raising the taxable wage ceiling from $7,400 to $8,000, and effective January 1, 1973 to $8,500. At the present contribution rate of one percent of taxable wages earned during the year, no taxable wage ceiling increase could provide revenue sufficient to finance the increase in benefits this proposal provides.

The costs presented in this estimate would have been greater had the maximum weekly benefit amount of $105 been in effect for the entire 1972 calendar year.

Estimate of the effect of removing the following sentence from section 2612 of the IRC: In no case shall the term "disability" or "disabled" include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter.

A. Our ability to make an accurate estimate depends on the accuracy of the three pieces of data for the estimate:

1. the average weekly base benefit amount the claimants added by the deletion of the sentence
2. the number of women who would file claims as a result of the deletion of the sentence
3. the average number of weeks basic benefits and the average number of days of hospital benefits the claimants would receive.

B. The three pieces of data are (presented above) by their supposed accuracy.

C. For a number of years the (average) weekly benefit amount women receive as a percent of the average weekly benefit amount for the entire program has remained fairly constant:

Year	Women's WBA as % of all WBA
1966	85.2%
1967	86.1
1968	88.0
1969	87.1
1970	86.0
1971	86.8

The average WBA for 1972 is estimated to be $71.87. (For Jan.-July of 1972 the actual figure — which we get to see this effect of the April increase in the maximum WBA — is $70.29)

The women's WBA in 1972 is estimated to be 87.6% of the over-all average WBA or:

$71.87 x 0.876 = $62.96.

We have decided to use this WBA even though women of child bearing age may have a lower average WBA than all women claimants. (Another view holds that the majority of births, abortions, and so on occur to younger women who have been in the labor force as long as have women careerists whose higher earnings obstruct the average weekly benefit amount.)

(and numbers)

D. The "types" of disabilities that would be compensable if the sentence in section 2626 of the UI Code were deleted are as follows:

Item	Prior complications of pregnancy	
	None	Some
Live births	88,800.	22,200.
Maternal deaths(a)	20.	5.
Fetal deaths(b)	1000.	250.
Neonatal deaths(c)	1130.	280.
Abortions(d)	25,759	6365
	116,709.	29,100.

(a) Maternal deaths are those due to complications of pregnancy, child birth, and the puerperium
(b) Fetal deaths are those of 20 or more weeks of gestation
(c) Neonatal deaths are those under 28 days
(d) Abortions performed under California laws; illegal abortions not considered

The (expected) number of female claimants to be assigned to each cell in the table above are computed thusly: (in 1972)

1. Live births: 111,000 (88,800 + 22,200). This number is about ½ of all live births expected to occur in 1972 to all California residents. That ratio is about the experience other State Disability programs with pregnancy provisions have had.

A previous estimate was computed by first dividing

the number of California live births to women of a particular age category by the number of California females in the same age category to obtain a birth rate. That birth rate was then applied to the known number of women covered by disability insurance to obtain the live births expected from working women. The resulting number - nearly 167,000 live births to women covered under the disability insurance laws - was considered to be unsatisfactory: it seemed unlikely that almost 1 out of every 2 live births in California occurred to women covered by disability insurance laws who had qualifying earnings.

The division of the 111,000 live births is based on tabulations of data from Blue Cross/Blue Shield. Based on 70,000 Northern California households, ⅓ of all live births resulted from women who had prior complications of pregnancy.

2. Maternal deaths. In 1970 there 22 maternal deaths per 100,000 live births in California (1971 California Statistical Abstract, p. 50, Table C-1) This means 24 maternal deaths. One-fifth of 24 is about 5.

3. Fetal deaths. There are about 11.3 fetal deaths per 1,000 live births.

$$111{,}000 \text{ live births} \times \frac{11.3}{1000} = 1254 \text{ fetal deaths}$$

(Same source as #2)

Using the ratio 1/5 to apportion the 1234 maternal deaths to women who suffered no prior complications of pregnancy, 250 who died.

4. Neonatal deaths. There are about 12.7 neonatal deaths per 1000 live births

$$111{,}000 \text{ live births} \times \frac{12.7}{1000} = 1410 \text{ neonatal deaths.}$$

Using the 1/5 ratio indicates 1130 neonatal deaths to women who suffered no prior complications of pregnancy and 280 who died. (Source: same as above.)

5. Abortions. The Epidemiology Unit of the Bureau of Maternal and Child Health says that the abortion rate (legal) in 1971 for California residents who gave birth ages 15-44 was 286.7 per 1000 live births

$$111{,}000 \text{ live births} \times \frac{286.7}{1000} = 31{,}824.$$

Three qualifications:

1) the abortion rate might be expected to increase in 1972 because the legal abortion program is still relatively new in Calif.

2) if economic conditions worsen in 1972 the abortion might be expected to increase.

3) the abortion rate might well be higher for working women than non-working women.

The split out of the 31,824 is accomplished by the 1/3 ratio.

E. The greatest unknown factor is the average number of basic weeks to be compensated and hospital days to be paid. (See note on p. 12)

1. Live births. Assign 4.0 hospital days to women with no prior complications, 10.0 to women with prior complications

$12 per day x 83,800 x 4.0 days = $4,262,400.
$12 per day x 22,200 x 10.0 days = $2,664,000.
TOTAL $6,926,400.

For live births where there were no prior complications of pregnancy, assume that, on the average, the physician will order his patient to stop working 11.0 weeks prior to expected termination of the pregnancy, and that the patient will continue drawing basic benefits for the 4.0 weeks post operative period for recuperation.

88,800 x $62.96 x 15 weeks = $83,862,720.

When prior complications are involved we assign 4.0 additional weeks. It is recognized that there will be "Sophia Loren" cases where the woman is ordered to bed for the full length of her pregnancy to avoid miscarriage. Actuaries we have consulted have.

with that the 7.0 additional weeks we excerpted in one estimate was about twice as high as it should be, although they too were unable to find specific data to support that position.

22,200 x 19 weeks x $62.96 = $26,556,528.

2. Abortions: This is the second largest cost component of the estimate, and is subject to a fairly accurate estimate.

The California Department of Public Health says 2/3 of all abortions are hospitalized one day, 1/5 are hospitalized 2 days, and the rest are, on the average, hospitalized 3 days. There is no need, therefore, to distinguish between abortions which are and which are not the result of prior complications.

2/3 = 10/15; 1/5 = 3/15; the rest = 2/15

$\frac{10}{15}(31,824 \times \$12 \text{ per day} \times 1 \text{ day}) + \frac{3}{15}(31,824 \times \$12 \text{ per day} \times 2 \text{ days}) +$

$\frac{2}{15}(31,824 \times \$12 \text{ per day} \times 3 \text{ days}) = \$560,102.$

Most abortions are performed with no physical post operative complications — but statistically a small number are. It is also possible to distinguish post operative cases which result in mental anguish — cases where the abortion is

filled with shame, remorse, guilt, and so on, and there must be cases where some abortees are more too stable mentally to begin with, so that the operation pushes them over the line. At any rate, we have decided therefore that all abortees should be assigned 1.0 weeks of basic benefits. ~~We [illegible] assigned them an average of [illegible]~~

31,824 x $62.96 x 1.0 weeks = $2,003,639. ✓✓

3. Maternal deaths. The 20 cases of maternal deaths (which by a rough definition are those women who die during birth) will be assigned the 11.0 weeks of basic benefits ~~appropriate normal pregnancies~~, but by definition no weeks for recuperation. They will receive 1 day of hospital benefits.

20 x 11.0 weeks x $62.96 = $13,851. ✓✓
20 x 1.0 days x $12 per day = $240.

The 5 cases of maternal deaths which resulted from some prior complications of pregnancy will receive the 11.0 weeks given for "normal" maternal deaths and an additional 4.0 weeks due to complications. Assume the full 20 days of hospitalization.

5 x 15 weeks x $62.96 = $4722. ✓✓
5 x 20 days x $12 per day = $1200.

4. Fetal deaths. By definition the fetus dies on or after the twentieth week of gestation. As a result of a fetal death, women who have had no prior complications of pregnancy might receive 1 day of hospitalization. Since 20 weeks is 5 months, a fetal death could occur in the ~~5th~~ 6th, 7th, 8th, or 9th month. Those that occurred in the ~~5th~~, 6th, or 7th month would receive no weeks of basic benefits, while those which occurred in the last two would receive some.

Therefore, we will assign an average duration of 2.0 weeks for women to which fetal deaths have occurred and who had no prior complications

4by 1000X 1 day x $12 per day = $12,000 - hospital benefits
1000X 2.0 weeks x $62.96 = $125,920 - basic benefits

Where the fetal deaths have occurred and the women have had some prior complications of pregnancy: we will assume 20 days of hospital benefits will be paid, and 6 weeks of basic benefits (2.0 weeks - the same as normal fetal cases - plus 4.0 weeks assigned for complications where normal live births resulted

8by 250 X 20 x $12 per day = $60,000.
250 x $62.96 x 6.0 week = $94,440.

5. Neonatal deaths. No cost component is estimated. Cases of neonatal death appear, by definition, in live birth statistics

F Two offsetting factors are considered before the cost components are ~~summed~~.

1. The sum of ~~the~~ basic & hospital benefits should be reduced by 5%. Claimants are limited in the (to the) duration of benefits because of 26 weeks times the weekly benefit amount or one-half base period wages. Experience indicates, therefore, a 5% reduction due to the rule.

2. On the other hand, benefits = basic & hospital - perhaps should be increased because of the degree of "anti selection." Some women might consciously arrange the pattern of their employment and pregnancy so as to capitalize on the disability insurance "bonanza." The degree of "anti selection" is anyone's guess, but reasonably it might increase as the benefit scale is increased.

For convenience we have assumed the two factors are offsetting.

State of California
Department of
Human Resources Development
1972 X #5

Employment Data and Research
June 30, 1972

CALIFORNIA DISABILITY INSURANCE PROGRAM

The Cost of SB 419 As Amended June 29, 1972, To Provide That the Disability Insurance Program Shall Pay 10 Weeks of Benefits For Normal Pregnancies and a Maximum of 26 Weeks for Injury or Illness Caused by Pregnancy, If the Claimant was Employed at Least 10 Months Prior to the Termination of Her Pregnancy.

Estimated Full Effect of SB 419 As Amended In a Year Like Calendar Year 1972
Accrual Basis

(dollar amounts in millions)

Item	Present Statute	Under SB 419 As Amended	Increase Amount	Increase Percent
Net worker contributions accrued	$339.0	$339.0	$	$
Net benefits incurred	$330.1	$410.6	$80.5	24.4%
Basic	300.0	374.0	74.0	24.7%
Hospital	30.1	36.6	6.5	21.6%
Net benefits as a percentage of net contributions	97.4%	121.1%	--	--

This estimate is derived from data obtained from the U.S. Public Health Service, the Bureau of the Census and the California Department of Finance. It takes into account the experience of disability programs in Rhode Island and New Jersey with pregnancy benefits.

It is assumed that almost all claimants entitled to the 10 weeks of benefits would claim the full amount. That assumption is based on the experience of such programs in other states and by independently conducted studies of the California Disability Insurance Program. (See Sinai, Nathan, Dr., Bureau of Public Health Economics, Research Series No. 5, For the Disabled Sick, Disability Compensation.)

The above estimate assumes that one-third of the pregnancies resulting in live births would be compensated. If women would be able to arrange the pattern of their employment and pregnancy to gain benefits the potential cost of the proposal is understated.

Approximately 160,000 female claimants would benefit from this proposal in a year like calendar year 1972.

The amended bill includes a schedule of rates to escalate the employee contribution above the present one percent rate to maintain a relationship between the amount of the fund reserve and benefits paid each year. If the proposal is enacted, the contribution rate would be 1.2 percent for most years with a few years at either 1.1 or 1.3 percent.

W 1972 NBS

1. 111,000 live births in 1972 to women covered by O.I. who have qualifying earnings

fetal deaths = 11.3 per thousand live births =
111 x 11.3 = 1,254 ·

maternal deaths = 2.2 per 10,000 live births =
11.1 x 2.2 = 24 ·

abortions = 47,000 · why changed

prior complications = ⅕ x 111,000 = 22,200

. HOSPITAL BENEFITS

A. Live births ?
4.0 days x $12 day x 111,000 = $5,328,000

B. Abortions = $827,200 (see unpublished 126,000 estimate)

C. Prior complications

22,200 x 1 day x $12 = $266,400 ·

. Maternal deaths

24 x 1 day x $12 = $288 ·

E. Fetal deaths

4.0 days x $12 x 1,254 = $60,192.

F. Summarizing the increase in 1972 hospital benefits attributable to pregnancy provisions

Item	Amount
Live births	$ 5,328,000.
Abortions	827,200.
Prior Complcats	266,400.
Maternal deaths	288.
Fetal deaths	60,192.
TOTAL	$ 6,482,080.

3. Basic payments in 1972 for pregnancy procedures

A. Woman's WBA in '72 = $62.96

B. Live births

111,000 x 9.5 weeks x $62.96 = $66,391,320.

C. Abortions = $2,959,120.

D. Prior complications

22,200 x 6.0 weeks x $62.96 = $8,386,272.

E. Fetal deaths

1,254 x 2 weeks x $62.96 = $157,904.

F. No calculation for maternal deaths

Summary

Item	Hospital	Basic	Total
live births	$ 5,328,000.	$ 66,391,320.	
Abortions	827,200.	2,959,120.	
Fetal Complications	266,400.	8,384,272.	
Maternal deaths	288.	-0-	
Infant deaths	60,192.	157,904.	
TOTAL	$ 6,482,080.	77,894,616.	

Because the persons who would benefit from the pregnancy provisions would fall under the one-half base period provision, a 5% reduction in basic benefits is required.

$ 77,894,616 x 0.95 = $ 73,999,885.

Hospital	$ 6,482,080.	$ 6.5 M.
Basic	$ 73,999,885.	74.0 M.
TOTAL	$ 80,481,965.	$ 80.5 M.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-640

DWIGHT GEDULDIG,

Appellant,

—v.—

CAROLYN AIELLO, individually and on behalf of all others similarly situated,

Appellees.

DWIGHT GEDULDIG,

Appellant,

—v.—

AUGUSTINA D. ARMENDARIZ, ELIZABETH B. JOHNSON, JACQUELINE JARAMILLO, *et al.*, individually and on behalf of all other women similarly situated,

Appellees.

CONSOLIDATED CASES ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF *AMICI CURIAE*

Interest of *Amici*[1]

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members dedicated to defending the right of all persons to equal treat-

[1] This brief is filed with consent of the parties. The letters of consent have been filed with the Clerk of the Court.

ment under the law. Recognizing that discrimination against women is a pervasive problem at all levels of society, and is often reinforced by governmental action, the American Civil Liberties Union has established a Women's Rights Project to work toward the elimination of sex-based discrimination. The American Civil Liberties Union believes that these cases concerning the rights of members of the work force disabled due to pregnancy pose constitutional issues of great significance to the achievement of full equality under the law between the sexes.

Lawyers for the American Civil Liberties Union have participated in a number of cases involving gender discrimination in employment and employment-related benefits. We acted as *amicus curiae* in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), which involved automatic dependency benefits for the wives of servicemen, while servicewomen were required to prove that their husbands were dependent on them for more than half of their support before they could qualify. This sex-based differential was held by the Court to constitute invidious discrimination in violation of the fifth amendment. We also acted as *amicus curiae* in *Cohen* v. *Chesterfield County School Board* and *Cleveland Board of Education* v. *La Fleur*, —— U.S. —, 42 U.S.L.W. 4186 (Jan. 21, 1974). Lawyers for the American Civil Liberties Union were counsel in *Struck* v. *Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1971, 1972), *cert. granted*, 409 U.S. 947 (1972), Brief for Petitioner filed December 8, 1972 (No. 72-178), judgment vacated and remanded for consideration of mootness when the Air Force rescinded its order directing involuntary discharge of Captain Struck for pregnancy. With regard to the general problem of sex-based discrimination, lawyers for the Amer-

ican Civil Liberties Union presented the appeal in *Reed* v. *Reed*, 404 U.S. 71 (1971).

The National Organization for Women (NOW) is a national membership organization of women and men organized to bring women into full and equal participation in every aspect of American society. The organization has a membership of approximately 30,000, with over 500 chapters throughout the United States. Its membership consists of large numbers of working women who are immediately affected by California's disability program.

NOW, since its inception, has sought enforcement of the Fourteenth Amendment as part of its efforts to achieve equal protection of the laws for women. Basic to these efforts is the securing of even handed treatment of pregnant women and women suffering pregnancy-related disabilities. The decision of this Court will have significant impact on large numbers of working women, including many members of NOW.

The Center for Constitutional Rights is a non-profit, tax exempt legal and educational corporation dedicated to advancing and protecting the rights and liberties guaranteed by the Bill of Rights to the United States Constitution. Born of the efforts of lawyers in the Civil Rights Movement in the South, the Center has since that time included in its legal efforts other groups which have been the subject of systematic and pervasive discrimination.

Since 1969 the Center has devoted substantial energy to the struggle of women to effectuate their constitutional rights to procreative liberty and equal protection of the laws. It was deeply involved in litigation culminating in the recognition of abortion as a fundamental right in

Roe v. *Wade*, 410 U.S. 113 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973), and continues to represent women challenging a variety of official attempts to restrict that right in practice.

In addition to these efforts to assure women control over their reproductive capacity, Center for Constitutional Rights has also been active in assuring equal protection of the laws to women who chose to procreate, particularly with respect to punitive and sex-discriminatory employment policies relating to pregnancy and maternity.

The purpose of this brief is to argue that women workers disabled due to pregnancy are similarly situated to persons disabled due to all other conditions covered by California's disability program, and that the exclusion of pregnancy-related disabilities from the program therefore violates the equal protection guarantee of the fourteenth amendment. It is further contended that the exclusion of disabilities related to pregnancy heavily burdens the exercise of a woman's fundamental right to decide whether to bear a child and therefore violates the due process clause of the fourteenth amendment.

Opinions Below

The opinion of the United States District Court for the Northern District of California declaring unconstitutional the third sentence of Section 2626 of the California Unemployment Insurance Code as it existed prior to January 1, 1974, is reported at 359 F. Supp. 792 (1973). The court's summary order denying appellant's motion to reconsider and set aside the judgment, and Judge Williams' dissenting memorandum, are unreported. Copies of all

opinions below are set out in the Jurisdictional Statement at Appendices A, B, C, and D.

Statutes Involved

The statute challenged herein is California Unemployment Insurance Code Section 2626. At the commencement of this action, that statute provided:

> 'Disability' or 'disabled' includes both mental or physical illness and mental or physical injury. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work. In no case shall the term 'disability' or 'disabled' include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter.

Effective January 1, 1974, the statute was amended and now provides:

> 'Disability' or 'disabled' includes both mental or physical illness . . . mental or physical injury, and, to the extent specified in Section 2626.2, pregnancy. An individual shall be deemed disabled in any day in which, because of his physical and mental condition, he is unable to perform his regular or customary work.

The new Section 2626.2 provides:

> Benefits relating to pregnancy shall be paid under this part only in accordance with the following:
>
> (a) Disability benefits shall be paid upon a doctor's certification that the claimant is disabled because of

an abnormal and involuntary complication of pregnancy, including but not limited to: puerperal infection, eclampsia, caesarean section delivery, ectopic pregnancy, and toxemia.

(b) Disability benefits shall be paid upon a doctor's certification that a condition possibly arising out of pregnancy would disable the claimant without regard to the pregnancy, including but not limited to anemia, diabetes, embolism, heart disease, hypertension, phlebitis, phlebothrombosis, pyelonephritis thrombophlebitis, vaginitis, varicose veins, and venous thrombosis.

Statement of the Case

Amici incorporate the Statement of the Case set out in Brief for Appellees, No. 73-640.

Summary of Argument

I.

Women disabled due to pregnancy are similarly situated to persons disabled due to other conditions covered by California's disability program. For employment-related purposes disabilities due to pregnancy are functionally indistinguishable from disabilities due to other physical and mental conditions. Courts, legislatures and administrative agencies are increasingly recognizing this fact. Even historically, absent an express exclusion, pregnancy-related disabilities have long been treated by courts, arbitrators, and administrative agencies under the rubric of sickness or illness. Grounds offered by appellant for distinguishing pregnancy from illness and injury are irrele-

vant to the question presented by this appeal, for it is not pregnancy that is in issue, but rather and only the disabled physical condition of a worker related to childbirth, a physical condition that renders her unable to perform her regular or customary work.

II.

Exclusion of disabilities due to pregnancy from California's disability program constitutes a sex classification and also burdens the fundamental right to decide whether to bear a child. Therefore, the strictest equal protection standards of review should be applied. At the least, the Court should closely scrutinize the classification. Even under a less exacting standard of review the exclusion is unjustified, for it invokes an arbitrary means to accomplish the state objective.

Under due process principles, the state is required to show that a compelling interest justifies the substantial burden placed upon exercise of the fundamental freedom to decide whether to bear a child. Appellant has not demonstrated any such compelling interest; therefore the treatment of pregnancy-related disabilities violates the due process clause.

ARGUMENT

I.

Women disabled due to pregnancy are similarly situated to persons disabled due to other physical or mental conditions covered by California's disability program.

California's disability program provides compensation and partical income replacement for employed persons disabled due to virtually any physical or mental condition. Section 2601 of the California Unemployment Insurance Code explains that the Code sections dealing with the disability plan

> shall be construed liberally in aid of its declared purpose to mitigate the evils and burdens which fall on the unemployed and disabled worker and his family.

Despite this policy, the mythology that pregnancy-related disabilities are unique and functionally different from all other disabilities has until recently resulted in the total exclusion from disability benefits of all women disabled by pregnancy-related conditions. Not only were disabilities arising from miscarriage, ectopic pregnancy, and other abnormal pregnancy-related conditions excluded, but even a claimant disabled by a condition which would have been disabling apart from pregnancy was excluded from coverage if she incurred that condition while pregnant. 359 F. Supp. at 801.

The fact that pregnancy-related disabilities are functionally no different from any other disability for purposes of benefit programs was at least partially recognized in

Rentener v. *California Unemployment Insurance Appeals Board*, 32 Cal.App.3d 604, 108 Cal. Rptr. 336 (1973), in which the court found that a woman disabled on account of an ectopic pregnancy was entitled to recover benefits under the disability plan. California has since revised the total exclusion of pregnancy-related disabilities and now statutorily provides disability compensation for

> abnormal and involuntary complications of pregnancy . . . [and] . . . conditions possibly arising out of pregnancy [which] would disable the claimant without regard to the pregnancy . . . Cal. Unempl. Ins. Code Ann. §2626.2(a) (Suppl. 1973)

Thus California has come part of the way in acknowledging that disabilities relating to pregnancy are functionally identical to all other disabilities. The physically disabled person is unable to work and earn a wage during the period of disability, and suffers the effects of economic dislocation on account of the existence of the biological event. The purpose of the program is to mitigate the economic dislocation of physical inability to work. That physical inability is no less real when it flows from pregnancy than when it flows from any other condition.

The mythology of pregnancy, however, has resisted rational inspection. This Court dealt with one aspect of that mythology this term in *Cleveland Board of Education* v. *La Fleur*, —— U.S. ——, 42 U.S.L.W. 4186 (Jan. 21, 1974). In *La Fleur*, the Court held that pregnant workers could not be treated as if they were disabled before their condition in fact occasioned disability. The case at bar is complementary to *La Fleur*. Here, appellees contend that when

pregnant workers do in fact become disabled, the law must respond to that reality.

The myth of pregnancy is at last eroding under the spotlight of reasoned analysis. The overwhelming modern view is that pregnancy-related disabilities are, for legal purposes, identical to all other disabilities, and that disparate treatment is not justifiable.

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e *et seq.* (hereinafter referred to as "Title VII") forbids, *inter alia*, discrimination on account of sex in employment. The Equal Employment Opportunity Commission, the federal agency charged with administering Title VII, has promulgated an interpretive guideline which provides:

> Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability or sick leave plan available in conection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities. 29 CFR Section 1604.10(b).

This guideline has been upheld and applied by all courts, save one, that have had occasion to rule on it. In *Dessenberg* v. *American Metal Forming Co.*, —— F. Supp. ——, 6 EPD ¶8813 (N.D. Ohio 1973), the court found no reasonable basis to distinguish pregnancy-related disabilities from other disabilities for which sick leave and sick pay were available.

> [S]ick leave is granted to dry out drunken employees, and to those suffering from the abuse of tobacco, although it is refused to a pregnant woman. . . . Alcoholism is at least as voluntary and deliberate as pregnancy. If sick benefits are available for one, they should be for another.

Accord, Wetzel v. *Liberty Mutual Insurance Co.*, —— F. Supp. ——, 7 FEP Cases 34 (W.D. Pa. 1974) (income protection plan excluding disability due to pregnancy discriminates against female employees in violation of Title VII); *Vick* v. *Texas Employment Commission*, 6 FEP Cases 411 (S.D. Tex. 1973) (pregnant women may not be presumed unavailable for work for unemployment compensation purposes by a state agency which, as an "employment agency" under Title VII, was bound by the statute's provisions [guidelines not specifically relied upon]). *But cf. Newmon* v. *Delta Air Lines, Inc.*, —— F. Supp. ——, 7 FEP Cases 26 (N.D. Ga. 1973).

Other federal statutes and regulations acknowledge that, for employment benefit purposes, there is no fundamental difference between pregnancy-related disabilities and other disabilities. The Office of Federal Contract Compliance, the agency authorized to enforce Executive Order 11246 prohibiting, *inter alia*, sex discrimination in employment

by federal contractors, has promulgated for comment a proposed guideline identical to the guideline under Title VII. 38 Fed. Reg. No. 247 (1973). Under the Railway Unemployment Insurance Act women disabled due to pregnancy are eligible for disability benefits. 45 U.S.C. Section 351(k) defines "a day of sickness" as "a calendar day on which because of pregnancy, miscarriage, or the birth of a child, (i) [an employee] is unable to work or (ii) working would be injurious to her health . . . ." See also 45 U.S.C. Sections 354, 362.[12]

Finally, a growing number of state legislatures and attorneys general have acknowledged that pregnancy must be treated in the same manner as other disabilities. See *infra* at 19-22.

Modern recognition that persons disabled due to pregnancy are similarly circumstanced to persons suffering other disabilities has considerable historical support as well. In a line of cases beginning nearly a century ago, courts have applied to women disabled by pregnancy the rule applicable to similarly circumstanced persons disabled on account of any other physical condition.[2] A sub-

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[12] The statistic in Brief for Appellant at 35 n. 57 regarding yearly claimants for these benefits is out of date and reflects the post World War II baby boom. Only 3% of all female benefit recipients applied for pregnancy-related disabilities in both 1971-72 and 1972-73. ANNUAL REPORT OF RAILROAD RETIREMENT BOARD (1972) Statistical Supplement at 80-81, Table C-18; "Beneficiaries and Average Creditable Days for 1972-1973 Sickness By Type of Sickness," unpublished table available from Railroad Retirement Board, Chicago, Illinois.

[2] *See Queen* v. *Wellings*, 3 Q.B. Div. 426 (the Law Reports 1877-1878) (woman disabled by pregnancy was "so ill as not to be able to travel" under statute permitting use of deposition in that circumstance); *People* v. *Board of Education*, 82 Misc. 684. 144 N.Y.S. 87 (Sup. Ct. 1913), *reversed on other grounds*, 212 N.Y. 463, 106 N.E. 307 (1914) (absence from work on account of pregnancy must

stantial body of labor arbitration authority also treats disabilities related to pregnancy under the rubric of sickness, illness or injury.[3]

Although there is plainly no functional difference for employee benefit purposes between disabilities related to pregnancy and all other disabilities, appellants claim that discrimatory treatment of disabilities arising in connection with normal pregnancy is justified on the ground, *inter alia*, that pregnancy is "substantially different from illness or injury." Jurisdictional Statement at 11-15.

The issue in this case, however, is not whether pregnancy is an illness or an injury. Nor is it whether California is obligated to pay maternity benefits or benefits to "females who are absent from work due to normal preg-

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be treated like absence due to illness); *Auran* v. *Mentor School District No. 1*, 60 N.D. 223, 233 N.W. 644 (1930) (where absence due to illness discharges school board's duty to continue to employ teacher, so does absence due to pregnancy); *Schlueter* v. *School District No. 42 of Madison County*, 168 Neb. 443, 96 N.W.2d 203 (1959) (pregnant teacher discharged prior to disability was entitled to recover wages to the same extent as one whose subsequent illness would have precluded performance of entire contract).

[3] *See National Lead Co.*, 18 Lab. Arb. 528 (1952) (sickness and pregnancy, both resulting in a temporary physical inability to work, must be treated similarly for leave of absence purposes). *Accord, Republic Steel Corp.*, 37 Lab. Arb. 367 (1961). See also *Washington Publishers Association*, 39 Lab. Arb. 159, 160 (1962), arbitrator said that absence due to disability related to normal pregnancy is an "absence due to illness" because the disability "was a substantial impairment of her strength and her body functions, which made it impossible for her to perform her usual work. It would be unrealistic to hold that she was not entitled to sickness benefits." *Accord, Thornapple-Kellogg School District*, 60 Lab. Arb. 549 (1973); *Corporation of Borough of York*, 57 Lab. Arb. 758 (1971) (arbitrator pointed out that obvious intention of a sick leave plan is to provide earnings relief in periods of incapacity caused by illness, and that pain, discomfort and physical sickness associated with work, are the very things for which sick pay benefits are designed to provide).

nancy . . . " Brief for Appellant at 8.[4] The issue is whether women disabled due to pregnancy are similarly situated for disability compensation purposes to persons disabled due to the myriad other physical and mental conditions covered by California's program. Disability compensation for the period of actual disability, and only the period of actual disability is the relief sought by appellees.

None of the grounds asserted by appellant for distinguishing pregnancy-related disabilities from other disabilities constitutes a reasonable basis for differential treatment. Appellant's protracted explanation that pregnancy is a "normal biological function," Brief for Appellant at 17-19, hardly justifies the singular exclusion here at issue. No other category of disability is excluded from the program solely because it relates to a "normal biological function." For example, fertility is biologically normal, but disability due to a vasectomy is not excluded. Disability arising from a circumcision is not excluded though the uncircumcised state is normal. A hooked or flattened nose is biologically normal, but disability due to cosmetic surgery is not excluded. Thus, biological normality is not a general criterion used to determine eligibility for compensation. It cannot be invoked to justify the pregnancy exclusion when it is irrelevant in all other situations.

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[4] For the vast difference between "maternity benefits" and the disability compensation here in question, see *e.g.*, the 1952 INTERNATIONAL LABOR ORGANIZATION MATERNITY PROTECTION CONVENTION (revised) (cash benefits sufficient for full and healthy maintenance of mother and child during lengthy maternity leave); GUTBERGER, SERVICES DESIGNED TO HELP WOMEN TO COMBINE OCCUPATIONAL AND FAMILY RESPONSIBILITIES, IN ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT REGIONAL TRADE UNION SEMINAR 229 (1970) (describing Austria's one-year maternity leave benefit for working women).

Appellant's attempts to distinguish pregnancy-related disabilities on the ground that they are "voluntary and subject to planning," Brief for Appellant at 19, founder on the same shoal. Cosmetic surgery and vasectomy are normally voluntary and planned, yet disabilities relating to these conditions are fully covered by California's program.

The contention that pregnancy-related disabilities do not fit within the concept of "sick role," Brief for Appellant at 18-19, is similarly infirm. If one views "sick role" as involving the attendance of a physician, the performance of surgical procedures, the administration of anesthesia, and hospitalization, a woman disabled by pregnancy and childbirth clearly does fit within the "sick role." Even measured by the selected "sick role" criteria cited by appellant, pregnancy-related disability often fits the description. Pregnancy and childbirth are still a leading cause of female morbidity and mortality,[5] so in the broad sense, pregnancy does jeopardize survival. Furthermore, some pregnancies are not "desirable"[6] and, following even an uneventful delivery, a woman's motivation to recover from the ordeal may be critical to her physical and mental health. Finally, appellant does not require any other category of claimant to conform to the cited "sick role" criteria in order to

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[5] Warren M. Herd, M.D., *Is Pregnancy Really Normal?*, 3 Family Planning Perspectives 5, 8 (Jan. 1971); cf. *Wiesenfeld v. Secretary of Health, Education and Welfare*, 367 F. Supp. 981 (D. N.J. 1973).

[6] A study by Bumpass and Westoff indicates that from 750,000 to more than 1,000,000 births annually in the United States are unwanted. *The "Perfect Contraceptive" Population*, 169 Science 1177 (1970). See also Westoff and Westoff, From Now to Zero: Fertility, Contraception and Abortion in America at 68-69, 293-94 (1971).

qualify for disability compensation. Examples of covered disabilities that do not so conform have been set forth above: cosmetic plastic surgery and contraceptive sterilization.

Appellant also tries to distinguish pregnancy-related disabilities on the ground of the duration of the average claim. Brief for Appellant at 20. Reserving for later discussion the alleged potential for fraudulently exaggerated claims, *infra* at 35-37, it should be underscored here that no other category of disability is excluded because it is likely to result in large claims. Heart attacks, major surgery, and loss of limb generally occasion long periods of disability, but they are not excluded on that account. A maximum period for collection of benefits applies to all covered disabilities, California Unemployment Insurance Code, Section 2653. Therefore, even if appellant's assumptions about the duration of disabilities due to pregnancy were accurate, exclusion would not be justified. Moreover, there is scant basis for hypothesizing long duration for recovery from an uneventful delivery, and clear indication that, as the mythology of pregnancy endemic to our society dissolves, claims will become increasingly modest in size.[7]

Similarly, appellant's contention that women disabled due to pregnancy may not return to the work force fails to distinguish pregnancy-related disability from covered disabilities. California apparently has not undertaken to identify and exclude other disabilities based on return to the work force prognosis. Indeed, claimants are not excluded though the likelihood is high that their disability will turn out to be permanent. Because probability of re-

[7] *Cf.* A. MONTAGU, THE NATURAL SUPERIORITY OF WOMEN 16-17 (rev. ed. 1970).

turn to the work force has never been a ground for excluding any other class of claimant, it cannot be used to isolate and exclude pregnancy-related disabilities. Moreover, appellant's conjectures have all the earmarks of self-fulfilling prophecy. If women are treated by the state and their employees as detached from the work force when pregnancy disables them, denied disability compensation and other employment-related benefits, it is not surprising that some succumb to the disincentives barring the way to return, and to appellant's stereotyped vision of women's place post-childbirth.

In sum, appellant has not demonstrated any tenable distinction between disabilities due to pregnancy and disabilities due to the array of conditions covered by California's program, among them attempted suicide, self-inflicted wounds, cosmetic surgery, vasectomy, circumcision, disabilities occasioned by smoking, alcohol, drugs, limbs broken in athletic activity, and abortion.

The very fact that California provided explicitly for exclusion of pregnancy-related disability in the instant statute is instructive. It indicates that an express exclusion was thought necessary because without it, pregnancy-related disabilities would not be distinguished from other disabilities. Pregnancy-related disability, like other disabling physical conditions, requires medical care, usually includes hospitalization, anesthesia and surgical procedures and always involves some risk to life. The wage loss incurred by a pregnant employee during the period of disability is functionally indistinguishable from the loss caused by any other disability. Women disabled due to pregnancy are thus similarly situated to people disabled due to other physical and mental conditions.

II.

California's exclusion of pregnancy-related disabilities from eligibility for disability benefits violates the equal protection and the due process clauses of the Fourteenth Amendment.

Since disabilities related to pregnancy are no different, in terms of their effect on the wage earner, from disabilities connected with covered physical conditions, the issue before this Court is whether California can single out pregnancy-related disability for exclusion from coverage and burden the fundamental freedom to decide whether to bear a child. We believe the answer to this question is no. The California law, which totally excludes from eligibility for benefits disabilities related to normal pregnancy, but which includes virtually every other condition, is a clear and blatant violation of the fourteenth amendment.

A. *The Exclusion Constitutes a Sex Classification*

The California disability scheme, which compensates individuals for wage loss due to virtually any kind of physical or mental disability, imposes no limitation on the disabilities for which male workers can collect benefits. Man can recover for all the ailments which affect men and women. They can also recover for all of the ailments that affect only or primarily men, such as prostatectomies, circumcision, hemophelia, and gout. The only disabilities which California totally excludes are those related to normal pregnancy, disabilities which can be incurred only by women. Thus, the state applies a double standard. It allows men to recover for any condition which affects

them, including conditions which affect only men. But it denies benefits to women disabled by pregnancy, a condition that affects only women. A policy of this kind is overt sex discrimination. In effect, California applies one set of rules to female claimants and another set to males. In doing so, it discriminates on the basis of sex, in the same way that an employer who applies a different hiring policy to men with preschool age children than to women with preschool children discriminates on the basis of sex. *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971).

Pregnancy is a uniquely female condition. In the words of one appellate court judge, "Nobody—and this includes Judges, Solomonic or life tenured—has yet seen a pregnant male."* The *Aiello* court noted at the outset that discrimination of this kind, since it is based on a sex-lined characteristic, is sex discrimination. 359 F. Supp. at 795.

This view is shared by a wide range of authorities at the federal, state and local levels, including courts, legislatures and administrative agencies whose job it is to enforce federal and state laws prohibiting discrimination. Courts have found, for example, that rules declaring pregnant women ineligible for unemployment compensation discriminate on the basis of sex:

> While it is oversimplistic, it is true that only women become pregnant. It is equally clear that only women must remain barren to be eligible for and to receive unemployment compensation. This requirement . . . not only applies to only one sex but places a heavier

*Adapted from Chief Judge Brown's opinion dissenting from denial of a motion for rehearing *en banc* in *Phillips* v. *Martin Marietta Corp.*, 416 F.2d 1257, 1259 (5th Cir. 1969), vacated remanded, 400 U.S. 542 (1971).

> burden upon women who seek unemployment benefits. We hold that the statute discriminates against women on the basis of sex. *Hanson* v. *Hutt*, 517 P.2d 599, 601-02 (Wash. 1973).

Accord, Dessenberg v. *American Metal Forming Co.*, —— F. Supp. ——, 6 EPD ¶8813 (N.D. Ohio 1973) (sick pay); *Jordan* v. *Meskill*, —— F. Supp. ——, 1A CCH Unempl. Ins. Rep. ¶21,420 (D. Conn. 1973); *Orner* v. *Board of Appeals*, 3 CCH Unempl. Ins. Rep. (Md.), ¶8386 (Sup. Ct. Baltimore City, 1972) (Case No. 132572); *Stickel* v. *Mason*, —— F. Supp. ——, 1A CCH Unempl. Ins. Rep. ¶21,415 (D. Md. 1973); *Goodman* v. *Chrysler Corp.*, 5 CCH Unempl. Ins. Rep. (Mich.), ¶9341 (Mich. Cir. Ct. 1973) (No. 208538) (unemployment compensation).

Several courts have held that rules requiring dismissal of pregnant employees from their jobs or requiring them to take an unpaid leave of absence are sex discriminatory. In *Cerra* v. *East Stroudsburg Area School District*, 450 Pa. 207, 213, 299 A.2d 277, 280 (1973) the court said:

> Male teachers, who might well be temporarily disabled from a multitude of illnesses, have not and will not be so harshly treated. In short . . . pregnant women are singled out and placed in a class to their disadvantage. They are discharged from their employment on the basis of a physical condition peculiar to their sex. This is sex discrimination pure and simple.

Accord, Buckley v. *Coyle Public School System*, 476 F.2d 92, 95 (10th Cir. 1973); *Green* v. *Waterford Board of Education*, 473 F.2d 629, 634 (2d Cir. 1973); *La Fleur* v. *Cleveland Board of Education*, 465 F.2d 1184 (6th Cir.

1972), affirmed on other grounds, —— U.S. ——, 42 U.S. L.W. 4186 (Jan. 21, 1974); *Heath* v. *Westerville Board of Education*, 345 F. Supp. 501 (S.D. Ohio 1972); *Williams* v. *San Francisco Unified School District*, 340 F. Supp. 438, 442 (N.D. Cal. 1972). Federal opinion to the contrary has dwindled to a small minority. *See Schattman* v. *Texas Employment Commission*, 459 F.2d 32 (5th Cir. 1972), *cert. denied*, 93 S. Ct. 901 (1973); *Cohen* v. *Chesterfield County School Board*, 474 F.2d 395 (4th Cir. 1972), reversed on other grounds, —— U.S. ——, 42 U.S.L.W. 4186 (Jan. 21, 1974).

The Guidelines under Title VII, as noted *supra* at 10-11, treat discrimination against pregnancy as sex discrimination, and have been upheld by courts that have ruled on them.[9] In addition, state agencies administering state fair employment laws have also decided that singling out pregnancy for disadvantageous treatment constitutes discrimination on the basis of sex. For example, the New York State Division of Human Rights has ruled that arbitrary leave rules for pregnant teachers constitute sex discrimination. *State Division of Human Rights* v. *Board of Education of Union Free School District #22*, Case Nos. CS-2105-70 (June 29, 1971). Similarly, the Washington State Human Rights Commission has declared: "It is an unfair practice to . . . penalize [a woman] in terms or conditions of employment because she is pregnant or may require time away from work for childbear-

[9] The Guidelines reflect the studies and recommendations of the presidentially-appointed Citizens' Advisory Council on the Status of Women, which, as early as 1963, identified special state rules disqualifying pregnant women from unemployment and disability benefits as one of the key problems of sex discrimination facing working women. REPORT OF THE TASK FORCE ON SOCIAL INSURANCE AND TAXES, April 1968, at 22 and 44.

ing." Washington State Human Rights Commission, Maternity Leave Policy, 3 EPG ¶28,574 (Jun. 22, 1972) (WAC 162-30-020(2)). Most recently the State Human Rights Commission of New York ruled that under New York Human Rights Law, N.Y. Exec. L. §296.1(a) (McKinney 1972), employers must treat disabilities caused or contributed to by pregnancy as temporary disabilities. N.Y. State Division of Human Rights, R.C.-2067 (March 1, 1974).[10]

Finally, in addition to judicial and administrative authority, recognition is increasing among state legislatures and attorneys general that policies, like California's, which exclude pregnancy-related disabilities from state benefit schemes discriminate on the basis of sex and are illegal under the fourteenth amendment and state antidiscrimination laws. In Michigan, the Attorney General has ruled that arbitrary limits on the period of time a pregnant woman is eligible for unemployment benefits unconstitutionally discriminate against females on the basis of a physical condition unique to that sex. MICH. OP. ATT'Y GEN. (Feb. 18, 1972). Similarly, the Attorney General of Oklahoma has concluded that a "statute which discriminates on the basis of pregnancy is discriminating on the basis of sex." OKLA. OP. ATT'Y GEN. No. 72-211 (November 22, 1972). And since 1969, at least four states have re-

[10] For other examples, *see* Ill. Sex Discrimination Guidelines, 3 EPG (Ill.) ¶22,497.10 (1971); Md. Commission of Human Relations Sex Discrimination Guidelines §8, 3 EPG (Md.) ¶23,820 (1972); Minn. Sex Discrimination Guidelines §5, 3 EPG (Minn.) ¶24,490.06 (1971); N.Y. State Division of Human Rights Guidelines: Pregnancy, 3 EPG (N.Y.) ¶26,059 (1973); Pa. Sex Discrimination Guidelines, §2 (D), 1 Pa. Bull. 2359, 3 EPG (Pa.) ¶27,296.02 (1971); Wisc. Sex Discrimination Guidelines, 3 EPG (Wisc.) ¶29,100 (1972).

pealed or revised local laws singling out pregnant women as ineligible to receive unemployment benfits. These states include Connecticut,[11] Maine,[12] New Hampshire,[13] and Washington.[14]

Indeed, the conclusion that California's disability scheme discriminates on the basis of sex is inescapable, for appellant admits to a discriminatory motive. Throughout this litigation, California has contended that, in its view, women already receive a disproportionately high share of benefits because they contribute 28% of the funds and receive 38% of the benefits. Hence, the state legislature, to prevent an even greater distortion between male and female claimants, may exclude disabilities due to pregnancy. Brief for Appellant at 26-27. Appellant ignores the fact that women constitute 40% of the work force. Their contribution of only 28% of the fund is reflective of the typically low wages received by women. Women in fact receive less in benefits than their percentage in the work force would lead one to expect. However, even if they did use the fund disproportionately, that would not justify an exclusion directed solely at women. One may wonder if disproportionate use of the fund by blacks or Catholics would be thought by appellant to be sufficient justification for limiting access of those groups to the fund. While appellant's argument is clearly without merit, the fact that it is pressed insistently leaves no doubt on the point considered here: exclusion

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[11] Conn. Gen. Stat. Rev. §31-236(5) (1958), repealed by P.A. 140, L. 1973, effective Oct. 1, 1973.

[12] Me. Rev. Stat. Ann. tit. 26, §1192 (3) (Suppl. 1973).

[13] N.H. Rev. Stat. Ann., §282:4 (J) (Suppl. 1973).

[14] Wash. Rev. Code Ann., §50.20.030 (1962), as amended, Ch. 167, L. 1973, effective July 16, 1973.

from eligibility for benefits of women disabled due to pregnancy is expressly designed to discriminate against women as a class. The presence of a discriminatory motive should be taken into consideration by the Court in its analysis of whether the classification is constitutionally infirm. *Shapiro* v. *Thompson,* 394 U.S. 618 (1969).

In sum, the ruling below, that California's denial of benefits for disability due to pregnancy constitutes sex discrimination, is well supported by federal and state judicial, administrative and legislative authorities. Pregnancy is a sex-linked characteristic; only women can be injured by California's policy. Given this fact, and in view of appellant's own admission that the exclusion was motivated by a purpose to limit benefits for female claimants, characterization of the exclusion of sex discriminatory is beyond question.

B. *The Exclusion Burdens the Exercise of a Fundamental Freedom*

The exclusion of disabilities relating to pregnancy burdens a fundamental right protected by the fourteenth amendment—the right to decide whether to bear a child. This Court said in *Roe* v. *Wade,* 410 U.S. 113, 131 (1973).

> In a line of decisions . . . going back perhaps as far as *Union Pacific R. Co.* v. *Botsford,* 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy . . . does exist under the Constitution. . . . These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty" . . . are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities

> relating to marriage . . . , procreation . . . , contraception . . . , family relationships . . . and child rearing and education . . . . (Citations omitted.)

The Court decided in the *Roe* case that the decision whether to continue or to terminate a pregnancy, at least during the first and second trimesters of pregnancy, must be left up to the individual and her doctor lest the state unconstitutionally intrude into the zone of privacy protected by the Constitution.

The Court has recently recognized that this zone of privacy with respect to child bearing is unconstitutionally infringed by governmental action which has the effect of burdening women who chose to continue pregnancy rather than terminate it. In *Cleveland Board of Education* v. *La Fleur*, —— U.S. ——, 42 U.S.L.W. 4186 (Jan. 21, 1974), overly restrictive maternity leave rules for pregnant school teachers were struck down because they encroached unjustifiably upon the teacher's right to decide whether to bear a child. The Court noted that maternity leave rules directly affect "one of the basic civil rights of man" and that

> the Due Process Clause of the Fourteenth Amendment requires that such rules must not needlessly, arbitrarily or capriciously impinge upon this vital area of a teacher's constitutional liberty.

In the instant case, the exclusion of disabilities related to normal pregnancy burdens the fundamental right to decide to bear a child as surely as an overly restrictive maternity leave policy does. As one writer stated with

respect to denial of unemployment benefits to pregnant women:

> By denying benefits, the state is weighing the choice toward abortion, and continued employment and away from bearing a child and facing economic disaster. Auchincloss, *Unemployment Benefits,* WOMEN'S RIGHTS LAW REPORTER 38, 39 (Spring, 1973).

As in *La Fleur,* the appellees in this case are women who have chosen to continue their pregnancy. The state, however, punishes that decision by denying them, during the period of their disability, the income protection not denied to any other class of disabled persons. This treatment constitutes a clear burden on the right articulated by this Court in *Roe* and in *La Fleur.*[15]

C. *Appropriate Standard of Review*

In examining the gender classification present in this case, the Court should identify the applicable review standard under the equal protection clause. In determining whether legislative schemes violate the concept of equal protection, the courts have applied standards of review

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[15] In contrast to *Johnson* v. *Robison,* 42 U.S.L.W. 4313 (Mar. 5, 1974) it is plain that exclusion from income protection during pregnancy-related disability is a substantial burden and that no interest of a kind and weight sufficient to justify the burden has been demonstrated. *See infra* at 32-37. Nor can the burden be justified as a measure to limit family size, for it is well documented that where the woman worker is discriminated against on the basis of child-bearing and is not treated as a full member of the labor force, her incentive to delay, space or limit her births is reduced. *See* Woman's Rights and Fertility, paper prepared by the United Nations Secretariat Agenda Item 6, Symposium on Population and the Family (Honolulu, 6-15 August 1973), text following note 29 and at notes 30-33.

ranging from lenient to stringent. *See Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065 (1969). Two standards are generally contrasted: (1) the lenient or "rational relationship" test applicable in the generality of cases; (2) the "rigid scrutiny" test met only by demonstration of a "compelling state interest," applicable when the legislative scheme relates to a "fundamental right or interest" or invokes a "suspect" criterion.

To survive the "rational relationship" test, a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." *F. S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920), cited with approval in *Reed* v. *Reed,* 404 U.S. 71, 76 (1971). The more stringent test is exemplified in cases dealing with fundamental rights such as the right to vote and the right to travel, *e.g., Harper* v. *Virginia Board of Elections,* 383 U.S. 663, 667, 670 (1966) (poll tax in state elections); *Memorial Hospital* v. *Maricopa County,* —— U.S. ——, 42 U.S.L.W. 4277 (Feb. 26, 1974) (durational county residence requirement for non-emergency medical care to indigents), and in cases involving classifications based on race or national origin, *e.g., Graham* v. *Richardson,* 403 U.S. 365 (1971); *McLaughlin* v. *Florida,* 379 U.S. 184 (1964); *Takahashi* v. *Fish and Game Comm'n,* 334 U.S. 410 (1948).

In addition to the two commonly articulated review standards, some of the decisions of this Court suggest an intermediate standard: the legislation is "closely scrutinized," and the proponent of the challenged classification is required to show that it is "necessary to the accomplish-

ment of legitimate [legislative] objectives." *Bullock* v. *Carter*, 405 U.S. 134, 144 (1972); *cf. Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972).

The appropriate standard of review under the due process clause of the fourteenth amendment also requires California to demonstrate a compelling interest to justify the burden placed by the disability exclusion on the decision whether to bear a child. *Cleveland Board of Education* v. *La Fleur, supra.* This Court has made it clear that state benefit schemes affecting the exercise of a fundamental freedom cannot withstand constitutional review unless justified by a compelling state interest. In *Sherbert* v. *Verner*, 374 U.S. 398, 406-407 (1963), a disqualification for unemployment insurance which affected the exercise of first amendment liberties was struck down. The Court said:

> We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation," *Thomas* v. *Collins*, 323 U.S. 516, 530.

Because the instant case has both equal protection and due process implications, *amici's* position with respect to the appropriate standard of review is three-fold: First, California's sex discriminatory treatment of disabilities related to pregnancy establishes a suspect classification and relates to a fundamental right; no compelling justification

can be shown for the classification. Alternately, the classification at issue, closely scrutinized, is not reasonably necessary to the accomplishment of any legitimate legislative objective. Finally, without regard to the suspect or invidious nature of the classification, or the fundamentality of the interest affected, the line drawn by the California legislature, distinguishing between disabilities related to normal pregnancy and disabilities related to all other conditions, lacks the constitutionally required fair and reasonable relation to a permissible legislative objective.

D. *Sex Classifications Are Impermissible Under the Equal Protection Clause*

In 1971 this Court for the first time struck down a gender line drawn by a state statute on the ground that the classification denied women equal protection. The Court in *Reed* v. *Reed* said, 404 U.S. 71, 75 (1971):

> [The statute] provides that different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause.

The Idaho statute struck down gave men a preference over women for appointment as estate administrators based upon the stereotyped assumption that men have more business experience than women. *Reed* v. *Reed*, 93 Idaho 511, 514, 465 P.2d 635, 638 (1970). Although this Court found Idaho's interest in support of the statute "not without some legitimacy," 404 U.S. at 76, it nonetheless termed the classification "arbitrary" and found the legislation constitutionally infirm because it provided "dissimilar treatment for men and women who are . . . similarly situated." 404 U.S. at 77.

The careful scrutiny of sex as a line-drawing criterion evident in *Reed* was confirmed last term in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). In *Frontiero*, Mr. Justice Brennan declared for a plurality of the Court that sex classifications are subject to strict judicial scrutiny:

> [S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . . ." *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972). And what differentiates sex from such non-suspect statuses as intelligence or physical disability and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. 411 U.S. at 686.

The message of *Frontiero* is clear: persons similarly situated, whether male or female, must be accorded even-handed treatment by the law. Recently, the Solicitor General, speaking officially in his Memorandum for the United States as *Amicus Curiae* in *Cohen* v. *Chesterfield County School Board* and *Cleveland Board of Education* v. *La Fleur*, U.S.S.C. Nos. 72-777 and 72-1129, at 8, filed October, 1973, expressed with precision the significance of the *Reed* and *Frontiero* decisions:

> It is now well settled that the Equal Protection Clause of the Fourteenth Amendment . . . does not tolerate discrimination on the basis of sex. *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); *Reed* v. *Reed*, 404 U.S. 71 (1971).

The Court is urged to apply in this case the standard of review applied in the plurality opinion in *Frontiero*, that is, to declare and treat sex as a suspect classification.

However, the classification herein fares no better under the *Reed* standard of review. A number of courts have struck down sex-based classifications relying upon the decision in *Reed*. *See, e.g., Moritz* v. *Commissioner of Internal Revenue*, 469 F.2d 466 (10th Cir. 1972), *cert. denied*, 412 U.S. 906 (1973) (income tax deduction classification based primarily on sex); *Lamb* v. *Brown*, 456 F.2d 18 (10th Cir. 1972) (sex/age differential for juvenile offender treatment); *Brenden* v. *Independent School District*, 477 F.2d 1292 (8th Cir. 1973) (exclusion of girls from athletic program); *Bray* v. *Lee*, 337 F. Supp. 934 (D. Mass. 1972) (higher admission standards for females in Boston Latin Schools). Specifically, a number of courts have relied on *Reed* to invalidate as impermissible sex discriminatory classifications based on pregnancy. *Green* v. *Waterford Board of Education*, 473 F.2d 629 (2d Cir. 1973); *La Fleur* v. *Cleveland Board of Education, supra*, 465 F.2d 118, *affirmed on other grounds* —— U.S. ——, 42 U.S.L.W. 4186 (Jan. 21, 1974); *Heath* v. *Westerville Board of Education*, 345 F. Supp. 501 (S.D. Ohio 1972); *Williams* v. *San Francisco Unified School District*, 340 F. Supp. 438 (N.D. Cal. 1972); *cf. Shull* v. *Columbus Municipal Separate School District*, 338 F. Supp. 1376 (N.D. Miss. 1972).

The weight of authority is now evident: classifications drawn on the basis of sex rarely survive, however the court articulates the constitutional measuring rod. *See generally* Davidson, Ginsburg & Kay, Sex-Based Discrimination at 1-116 (West 1974).

E. *The Exclusion Is Not Justified by Reasons of Economy or Avoidance of Fraud*

Appellant's primary justification for the exclusion of disabilities related to normal pregnancy from the disability scheme is that covering such disabilities would be too expensive. It is clear that cost alone, however substantial, does not constitute the compelling state interest necessary to justify an invidious classification or the burdening of a fundamental liberty. *Memorial Hospital* v. *Maricopa County*, —— U.S. ——, 42 U.S.L.W. 4277, 4281 (1974); *Graham* v. *Richardson*, 403 U.S. 365 (1971); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969). As the Court said in *Memorial Hospital*,

> [A] State may not protect the public fisc by drawing an invidious distinction between classes of its citizens . . . so appellees must do more than show that denying [the benefit] saves money. The conservation of the taxpayers' purse is simply not a sufficient state interest to sustain a . . . requirement which . . . penalizes exercise of . . . [a fundamental] right. . . . 42 U.S.L.W. at 4281-4282.

In particular, this Court and others have rejected cost as a justification for discrimination on the basis of sex. See, e.g., *Frontiero* v. *Richardson*, 411 U.S. 677, 691 n. 25 (1973), where the annual cost factor for the benefit extended was an estimated $3.5 million in the Air Force and $1 million in the Navy. And in *Wiesenfeld* v. *Secretary of Health, Education and Welfare*, 367 F. Supp. 981 (D. N.J. 1973), defendant contended that the annual toll for eliminating sex-based differentials in the Social Security Act at 1973

benefit rates would be $325 million.[16] Nevertheless, the court struck down the sex classification in the challenged statute.[17]

Even where no suspect classification or fundamental right is at stake, cost alone does not justify a classification that is not fairly and substantially related to the object of the legislation. In *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619 (1973), the Court found that the benefits in question were as indispensable to the group excluded as to the group covered, hence the exclusion was not rationally related to the purposes of the legislation. See also *U.S. Dept. of Agriculture* v. *Moreno*, 413 U.S. 528 (1973).

It should be apparent from these decisions that appellant has not sufficiently justified the exclusion of pregnancy-related disabilities on the ground of economy. The state has failed to show that the exclusion is fairly related to the primary object of the legislation. Disability benefits are as indispensable to women disabled by pregnancy as

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[16] Affidavit of Lawrence Alpern, Deputy Chief Actuary, Office of the Actuary of the Social Security Administration, June 19, 1973, filed with the court in *Wiesenfeld*.

[17] Similarly, cost saving is not a defense to sex discrimination under Title VII. The Guidelines provide that "It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other." 29 CFR §1601.9(e). *See also Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 199-800, n. 8 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1971); *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970); *United States* v. *St. Louis-San Francisco Ry. Co.*, 464 F.2d 301 (8th Cir. 1972), *cert. denied sub nom. Transportation Union* v. *United States*, 409 U.S. 1107 (1973) (increased cost of required training no defense).

they are to all other disabled workers, and the overall purposes of the program are disserved by the exclusion. As the court below noted, California's legitimate interest in fiscal economy could have been served through a variety of means, none of them involving classification of the invidious kind here involved. 359 F. Supp. at 798-99.

Moreover, appellant has not in fact demonstrated that coverage of pregnancy-related disabilities would substantially burden the program. First, California's cost figure is based on an unfounded and very much disputed assumption that the *average* period of disability for a woman with a normal pregnancy is 13-15 weeks. Brief for Appellant at 31. The evidence upon which the state bases its estimate consists of claims received since the opinion of the court below, many of them for pregnancies involving complications, now covered by the statute. Nor did appellant review these claims to determine the extent to which they involve periods of actual disability before tendering them as evidence. Affidavit of Betty Kathleen Kidder, Appendix, pp. 62-64. Therefore it cannot be assumed that the full period claimed in any of these cases would be compensable if pregnancy disabilities were covered. To the contrary, evidence submitted to the court below indicated that the period of actual disability for a normal pregnancy varies widely. Many doctors estimated the average period of disability as no longer than three to six weeks. See affidavits of Drs. Hellegers, Crisp, Calderwood and Goldstein, Appendix, pp. 43-44, 45-46, 37, 38-39.

Furthermore, throughout this litigation, appellant has exaggerated the cost problem by misrepresenting appellees' claim entitlement to disability benefits only for pe-

riods of actual disability and not, as the state asserts, "for that period of time when [because of child-rearing obligations or for other reasons] they have *chosen* to be absent" from work. (Emphasis supplied.) Jurisdictional Statement at 10-11, n. 12. The period of actual disability may be the relatively short period associated with a normal pregnancy, or it may be a longer period of incapacity caused by a pregnancy with complications—but in either event it is not an unlimited or prolonged period of "maternity leave"[18] for which appellees seek coverage under California's plan.[19]

And finally, studies indicate that the cost of covering pregnancy-related disabilities on the same basis as other disabilities, whether in state or private programs, is not likely to be substantial. *See* GREENWALD, *Maternity Leave Policy*, NEW ENGLAND ECONOMIC REVIEW (Jan.-Feb. 1973) in which the Federal Reserve Bank of Boston concluded that increased costs would average out to a 4 cents raise in hourly wages in 1971 and a 2 cents raise in 1972, or an increase of 1.2 percent in hourly wage costs in 1971 and 0.6 percent in 1972. *See also supra* at 12, n. 1a.

Appellant's final justification for the exclusion in this case is that pregnant women will exaggerate the duration of their disability in order to collect disability compensation to which they are not entitled. But the potential for cheating cannot be assumed to be greater for pregnant

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[18] See *supra* at 14, n. 4.

[19] This case is unlike the Rhode Island program, much-cited by appellant, where pregnant women were allowed to recover benefits for extensive periods of time, whether or not they were disabled. Koontz, *Childbirth and Child Rearing Leave: Job-Related Benefits*, 17 N.Y.L. FORUM 480, 484-85 (1971).

women and their physicians than for anyone else. Also, that potential does not cause California to exclude from coverage other categories of claimants, such as the proverbial "whiplash" victim, who might exaggerate claims. Rather, safeguards are built into the system to prevent abuses. Claimants must file initial claims with a physician's statement indicating the existence and probable duration of the disability. If questions arise, the state agency may visit the applicant's home and submit a second questionnaire to the attending physician. A second medical opinion may also be secured from an independent medical examiner who sits on a state board for the express purpose of resolving disputes over claims. Affidavit of Betty Kathleen Kidder, Appendix, pp. 62-64. There is no reason to suppose that these procedures will not be as effective for disabilities relating to pregnancy as they are for all other disabilities.

Furthermore, barring some who will cheat has been held by this Court not to be a sufficient justification for excluding an entire class from benefits in cases involving invidious classifications, *Memorial Hospital* v. *Maricopa County, supra,* at 4283, in cases involving the burdening of a fundamental right, *Sherbert* v. *Verner,* 374 U.S. 398 (1963), and in cases involving classifications that did not meet the rational relationship test, *U.S. Dept. of Agriculture* v. *Moreno, supra,* 413 U.S. at 535-38. Eliminating from benefits an entire class of otherwise eligible claimants just to avoid paying cheaters is thus constitutionally indefensible whether strict scrutiny or a more lenient standard of review is applied. As this Court said in *Memorial Hospital*:

> [O]ther mechanisms . . . are available which would have a less drastic impact on constitutionally protected interests.

In sum, appellant's exclusion of disabilities related to normal pregnancy cannot be justified on the basis of cost or on the basis of avoidance of fraudulent claims. The classification is at least unreasonable—pregnant women are as severely affected by unemployment due to disability as are other workers[20]—and more appropriately characterized as invidious, since it heeps further disadvantage upon a class already subject to pervasive discrimination in the labor market.[21] At the time a woman becomes disabled by pregnancy, she has as great a need for income protection as does any other disabled worker. A state scheme which excludes her from coverage burdens the decision to continue the pregnancy, and draws an arbitrary and irrational line which is impossible to justify.

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[20] Nearly two-thirds of all women who work do so because they must. They are either unmarried, widowed or divorced and often the sole wage earner for the family, or their husbands earn less than $7,000.00 a year. WOMEN'S BUREAU, UNITED STATES DEPARTMENT OF LABOR, WHY WOMEN WORK 1 (rev. ed. 1973).

[21] According to the conservative estimate of the Council of Economic Advisers to the President a differential, perhaps on the order of 20 percent, between the earnings of men and women remains after adjusting for factors such as education and work experience. Women's Bureau, UNITED STATES DEPARTMENT OF LABOR, WOMEN WORKERS TODAY 6 (rev. ed. 1973).

CONCLUSION

For the reasons stated above, the decision of the court below should be affirmed, California's exclusion of disability compensation to women disabled due to normal pregnancy should be declared unconstitutional, and the benefits available to persons on account of physical and mental disabilities under California's disability program should be made available on the same terms and conditions to females disabled due to pregnancy.

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Supreme Court of the United States

October Term, 1973

No. 73-640

DWIGHT GEDULDIG,

Appellant,

v.

CAROLYN AIELLO, *et al.*
INDIVIDUALLY AND ON BEHALF
OF ALL OTHERS SIMILARLY SITUATED,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus*, in support of the position of the appellees, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of 113 national and international labor unions, having a total membership of approximately 13,500,000 working men and women. The AFL-

CIO has more than 4,500,000 female members, of whom approximately 300,000 are employed in the state of California. One AFL-CIO union, San Francisco Waitresses, etc., Local No. 45, Hotel and Restaurant Employees International, was a plaintiff below and is an appellee in this Court (App. 4). Another five of the AFL-CIO's affiliated organizations [1] intervened in the court below.

All of the female members of *amicus* who are of childbearing age and who work in California are directly affected by the issues in this case for they too may be disabled from work by pregnancy and be without income during the period of such disability unless the decision of the court below is affirmed. For this reason one of the priorities of the California Labor Federation, the AFL-CIO's state wide affiliate, has been reform of the features of the California Disability system that discriminate against women. See Appendix A setting out the resolutions passed by the State Federation's 1972 convention. Moreover, this problem is not limited to California. It is one of several states that have enacted disability legislation that discriminates against women. New York is one of these and the New York State AFL-CIO has devoted substantial time and resources to correcting the situation in that state. Indeed, it is precisely because the position taken herein reflects the considered judgments of its California and New York state bodies, and at their request, that the AFL-CIO has determined to take this opportunity to present its view to this Court.

[1] United Brotherhood of Carpenters and Joiners of America, AFL-CIO; United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO; International Ladies Garment Workers Union, AFL-CIO; and Contra Costa County Labor Council, AFL-CIO and Alameda County Central Labor Council, AFL-CIO.

SUMMARY OF ARGUMENT

In *Cleveland Board of Education* v. *La Fleur*, —— U.S. ——, 42 U.S.L.Wk. 4186, this Court disapproved "a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing [work]." *Id.* at 4187. The instant case presents an opposite but no less irrational conclusive presumption embodied in the California Unemployment Insurance Code, § 2626, *viz.* that as a matter of law a so-called normal pregnancy never involves injury or illness that renders a woman "physically incapable of continuing [or returning to work]." Under the reasoning of *La Fleur* the California presumption, like that of the Cleveland school borad, can not be squared with the requirements of the Fourteenth Amendment.

1. The brief for Appellant, e.g., pp. 8, 9, 10, 16, 17, fails to distinguish between pregnancy *per se* and childbirth and recovery therefrom. The court below did not hold, and so far as we can ascertain, no one is arguing, that the State of California should pay temporary disability benefits to any woman simply because she is pregnant and without more. Rather, the contention is that there is no difference relevant to any purpose of the statute between the period during which a woman is disabled from work by labor, childbirth and recovery therefrom and the period of time a male employee is disabled from work by any or all of the conditions which disable males and all of which are covered by the California statute.

California provides benefits for temporary disabilities stemming from "mental or physical illness and mental or physical injury" (Cal. Unempl. Ins. Code § 2626), other

than those related to pregnancy and childbirth. Testing this distinction between the disabilities covered and that not covered against all the relevant criteria demonstrates that California's exclusion of so-called normal pregnancy, childbirth and recovery is totally irrational.

First, the word "disease" for the purposes of medical classification includes delivery without complication precisely as that term includes the diseases covered by California. Second, the normal character of a delivery affords no rational basis for the exclusion. The concept of normality has no medical or scientific meaning. Moreover, California covers disabling mental and physical conditions such as obesity, alcoholism, and drug addiction that no less than childbearing are normal in the sense of occurring in the course of events. And California also covers sex limited operations such as circumcisions and prostatectomies. Finally, childbearing is the only condition that requires both close medical supervision and hospitalization excluded by California.

It is argued that California's position is justified by the fact that pregnancy is voluntary. Assuming *arguendo* that this characterization is correct, it does not aid the state for California covers disabilities resulting from self-inflicted injuries, fights, and as we have already noted, alcoholism and drug abuse.

2. The major purposes of the California disability insurance law "is to compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury." Cal. Unempl. Ins. Code § 2601. A woman who is not physically able to work because of pregnancy related

conditions requires this type of compensation as much as any other employee who can not work for physical or mental reasons.

The essence of the state's response is that the cost of coverage would be prohibitive. But there is no data from which the cost of covering all pregnancy related disabilities can be compared with the cost of covering other disabilities. From what is known, however, it is plain that the figures offered by the appellant are far higher than a reasonable person knowledgeable in the field would anticipate:

- The figures are based on experience under mandatory leave plans where employees were forced by the employer to go on unpaid leave without regard to disability;
- Periods of absence based on abnormal or complicated pregnancies are included;
- The figures are based on the assumption women will malinger rather than draw benefits only during a period of actual disability;
- It is also assumed that physicians will certify women as disabled without regard to the truth;
- Out-of-date birth rates are used, ignoring the fact that birth rates have fallen substantially over the past two decades;
- The figures do not reflect the well-established fact that women who work have fewer babies than the national birth rate and that as women have opportunities for advancement and higher wages they have still fewer babies;
- The benefit rates used fail to reflect that women have average wage rates only 60% as high as males and

accordingly draw benefits at the bottom of the scale of benefits.

Moreover, the argument that California's experience thus far shows that there is a greater ratio of costs to contribution for female workers than for males is equally wide of the mark. This difference is due to the lower pay rates of women and the graduated scale of benefits utilized by the state. When male and female workers in California are compared by wage level, as to the length of their absences from work, males have a higher average duration of absence in half the age groups.

Finally, while we have treated above with this aspect of California's defense to show that it is without substance as a matter of fact, the law is, as the court below properly appreciated:

> "[B]y excluding all pregnancy-related disabilities on the grounds that these claims will be large, the state denies pregnant women benefits on the basis of generalities and stereotypes contrary to the requirements of the equal protection clause." (App. A, p. 11-12.)

ARGUMENT

In *Cleveland Board of Education* v. *LaFleur*, —— U.S. ——, 42 U.S. L. Wk. 4186, this Court overturned as inconsistent with the Fourteenth Amendment the school board's "mandatory maternity leave rule • • • [which] compelled • • • a pregnant • • • female public school teacher • • • to quit her job without pay several months before the expected birth of her child" and its "limitations upon a teacher's eligibility to return to work after giving birth • • • until her child reaches the age of three months." (*Id.*

at 4187, 4191). The Court concluded:

"That the arbitrary cut-off dates embodies in the mandatory leave rules before us have no rational relationship to the valid state interest of preserving continuity of instruction.

• • •

"The mandatory termination provision of the Cleveland and Chesterfield County rules surely operate to insulate the classroom from the presence of potentially incapacitated pregnant teachers. But the question is whether the rules sweep too broadly. See *Shelton* v. *Tucker*, 364 U.S. 479. That question must be answered in the affirmative, for the provisions amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing.

• • •

"To the extent that the three months provision reflects the school board's thinking that no mother is fit to return until that point in time, it suffers from the same constitutional deficiencies that plague the irrebuttable presumption in the termination rules. The presumption, moreover, is patently unnecessary, since the requirement of a physician's certificate or a medical examination fully protects the school's interests in this regard. And finally, the three month provision simply has nothing to do with continuity of instruction, since the precise point at which the child will reach the relevant age will obviously occur at a different point throughout the school year for each teacher." (*Id.* at 4190, 4191-4192.)

In short, the Due Process Clause of the Fourteenth Amendment requires that • • • "rules [setting the terms on which the state treats pregnant women] must not needlessly,

arbitrarily or capriciously impinge upon this vital area of * * * constitutional liberty." *Id.* at 4189.

In *LeFleur*, the Court noted evidence pointing to "the possible role of outmoded taboos in the adoption of the [leave and return] rules." *Id.* at 4189, n. 9. And precisely because of the pervasive distorting influence of such taboos it is not surprising that some states have operated certain programs on a premise opposite to that of the school board in *LaFleur*, but no less irrational; *viz*, a "conclusive presumption" that as a matter of law a so-called normal pregnancy *never* involves injury or illness that renders a woman "physically incapable of continuing [or returning to work]." This case presents a paradigm example of the latter situation.

In *LaFleur* the Court recognized that it could "assume arguendo that at least some teachers become physically disabled from effectively performing their duties during the latter stages of pregnancy." *Id.* at 4190. That assumption, if properly founded, is sufficient to require affirmance of the decision below. And we now show that that assumption is not simply correct but uncontravertible.

I. The California statutory provisions, by excluding from temporary disability benefits female employees whose inability to work is due to childbirth or recovery therefrom, when such benefits are paid to male employees whenever they are disabled from work, irrespective of the cause, discriminate against female employees because of their sex.

The brief for Appellant, e.g., pp. 8, 9, 10, 16, 17, fails to distinguish between pregnancy *per se* and childbirth and recovery therefrom. The court below did not hold, and so

far as we can ascertain, no one is arguing, that the State of California should pay temporary disability benefits to any woman simply because she is pregnant and without more. Rather, the contention is that there is no difference relevant to any purpose of the statute between the period during which a woman is disabled from work by labor, childbirth and recovery therefrom and the period of time a male employee is disabled from work by any or all of the conditions which disable males and all of which are covered by the California statute.

Except for the express exclusion of "an injury or illness caused by or arising in connection with pregnancy" (§ 2626), such disabilities would be covered by the language of the California Unemployment Insurance Code. The eligibility language in the statute affords no definition of the scope of coverage except by using the word "disabled individual." Thus the coverage is dependent on the definition of disability or disabled.

The definition appears in § 2626, which reads:

> "Disability" or "Disabled" includes both mental or physical illness and mental or physical injury. An individual shall be deemed disabled in any day which, because of his physical or mental condition, he is unable to perform his regular or customary work. In no case shall the term "disability" or "disabled" include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter.

The second sentence by any fair reading would embrace a female employee in the hospital having a baby. Because of her "physical or mental condition," she is "unable to

perform her regular or customary work." The legislature obviously recognized that women disabled by pregnancy fell within this language and realized the addition of the third sentence was essential to take pregnancy-related disabilities out of the class covered.

A. The word "disease" for purposes of medical classification includes delivery without complication.

The World Health Organization Manual of the International Statistical Classification of Diseases, 1965 rev. ed., Geneva 1967, classifies normal delivery without complications as a disease. One of the disease categories assigned for classification purposes the digit number 650 is simply "Delivery" without mention of any complication. Each of the digit numbers 650-662 is assigned to a category which includes full term delivery of live or still-births, premature delivery of live-births, delivery of dead fetus after 28 weeks.

The digit numbers 630-634 are assigned to "Pregnancy-complication." In this category are included infections of the genital tract, ectopic pregnancy, hemorrhages, anemia and others.

The digit numbers 635-639 are assigned to urinary infections and toxemias of pregnancy and puerperium.

The digit numbers 640-645 are assigned to abortion which term is used to refer to any interruption of pregnancy before 28 weeks of gestation, not preceded by a prior death of the fetus. These digit numbers include abortions for medical indications, other legal indications, criminal abortions, self-induced abortions, spontaneous abortions, miscarriages and "other."

That the medical profession in the United States generally classifies all deliveries as diseases is shown by Helen Hershfield Avnet, *Physician Service Patterns and Illness Rates, A Research Report on Medical Data Retrieved from Insurance Records,* Group Health Insurance, Inc. (1967), which sets out, in a section devoted to "Morbidity Studies" (pp. 265-346), tables that include under various headings each of which include "Attended Illness," "Deliveries and Complications of Pregnancy, Childbirth and Puerperium," pp. 276, 281, 283, 293, 296, 301, 308, 320, and indicate the number of days in hospital, incidence as compared with other diseases and comparative utilization of physician services. Table 127 on p. 273 headed "Selected Incidence Rates," shows "Normal Delivery" nineteenth in the list, with 20 cases reported for 1000 exposure years. Above it on the list is obesity, in 14th place, with 25.2 cases. Also above normal delivery on the list are pharyngitis, 117.8 cases, bronchitis, 87.7 cases. In the chart headed "Incidence of Attended Illness by Diagnostic Category" there are 22 diagnostic categories in descending order of frequency with "Deliveries and Complications of Pregnancy, Childbirth and Puerperium" the 17th listed and showing a ratio of approximately 20 per exposure year (p. 281). Table 162 on page 428 shows the average number of days per stay in hospital with 4.4 for "Deliveries and Complications of Pregnancy, Childbirth and Puerperium." The average for diseases of the circulatory system is 12; for diseases of bones and organs of movement, 10.1; for diseases of male genital organs, 8.

B. The normal character of a delivery affords no rational basis for exclusion from benefits.

The State of California presently delineates the covered disability resulting from pregnancy from that not covered solely in terms of normality and voluntariness. The California Appellate Court in *Rentzer* v. *California Unemployment Insurance Appeals Bd.*, 32 Calif. App. 3d 604 (1973) used the word "normal" to distinguish the excluded pregnancy from the included pregnancy. In awarding benefits to *Rentzer* the court said:

> "But Rentzer's disability was not an ordinary maternity disability involving preparation for and recuperation from *normal* gestation and delivery." (Emphasis supplied.)

The 1973 amendment to Section 2626 (California Stats. 1973, c. 1026) uses the term 'abnormal" as one of the two critical tests:

> "Disability benefits shall be paid upon a doctor's certification that the claimant is disabled because of an *abnormal* and involuntary complication of pregnancy." (Emphasis supplied.)

While the 1973 amendment (Calif. Stats. 1973, c. 1026) does detail various of the complications which are to be covered, the use of the word "including" prior to the listing makes the words "abnormal" and "involuntary" the controlling tests as to all specific conditions not listed. The revision in language results in the pregnancy limitation now reading as follows (§ 2626.2):

> "Benefits relating to pregnancy shall be paid under this part only in accordance with the following:
>
> "(a) Disability benefits shall be paid upon a doctor's certification that the claimant is disabled because

of an abnormal and involuntary complication of pregnancy; including but not limited to: puerperal infection, eclampsia, caesarean section delivery, ectopic pregnancy, and toxemia.

"(b) Disability benefits shall be paid upon a doctor's certification that a condition arising out of pregnancy would disable the claimant without regard to the pregnancy, including but not limited to: anemia, diabetes, embolism, heart disease, hypertension, phlebitis, phlebothrombosis, pyelonephritis, thrombophlebitis, vaginitis, varicose veins, and venous thrombosis."

A careful analysis of the misleading character of the concept of normality with respect to the definition of disease appears in Dr. Edmond A. Murphy, "A Scientific Viewpoint on Normalcy," *9 Perspectives in Biology and Medicine, Vol. IX, No. 3, Spring 1966* pp. 333, 334-337, 344, 346-347:

"Six leading texts on anatomy and six on physiology have been consulted: it would be invidious to particularize further. None of them has a discussion on the normal; though each contains a long index, none has so much as an entry on the subject. It is only when the student comes to study disease that it becomes necessary to define when the limits of the normal have been transgressed, an oddly negative approach. And it can hardly be claimed that the efforts of the pathologist meet with success. An open-minded student must be puzzled at the definitions given. In an attempt to give an all-embracing definition of the diseased state, the pathologist is driven to the most absurd extremes. If disease is the reaction of the body to harmful or potentially harmful changes in its internal or external environment, then every time a man shivers with the cold

in an attempt to maintain body temperature, he is in a diseased state.

• • •

"The 'normal' distribution in the sense of the Gaussian has little to do with our problem. This nomenclature is unfortunately so deeply entrenched that we cannot ignore it, but we can recognize its irrelevance. To try to keep the ideas separate, we have adopted the term 'normalcy' rather than the more familiar one 'normality,' to denote the state of being normal.

• • •

"One other point it is necessary to make is that the word 'normal' is used in a variety of senses. Sometimes it merely connotes conformity to type; sometimes it has the quality of a value, or even a moral judgment. The point will not be developed further at this stage but it should be borne in mind as the ambiguity of meaning may be confusing. There is a widespread (but usually implicit) notion that the normal is to be identified with the habitual. The supposition is that observations will tend to cluster about some central value and that the further an observed value be from the mean or whatever measure of central tendency we may use, the more likely it is to be abnormal in the sense that it is more likely to be a cause or manifestation of disease. In passing it may be noted that in bimodal distributions the vast majority of the values may lie at the extremes and perhaps very few in the neighborhood of the mean, so that this criterion of central tendency would in such instances be very unsatisfactory.

• • •

"It may be claimed that there is at least one special category where we can distinguish a 'normal' from an 'abnormal' group—where a distinction can be made according to the presence or absence of an infecting or

infesting organism. It might be argued (and perhaps correctly) that subjects with a pathogenic organism are diseased and separable from those without it. Such a distinction might be defended by appealing to differences in survival rates. But there are problems here also and the key word 'pathogenic' conceals a treacherous tautology. Pathogenic means 'disease producing,' that is, producing an abnormal state, so we are reduced to the circular statement that the state produced by disease producing organisms is disease.

• • •

"Try as we may, we cannot come up with anything like an absolute definition of the normal from a scientific standpoint. Even if we concede that the normal can be defined on other grounds (and that is to beg the whole question) and even if we are prepared to tolerate mistakes of classification in both directions and of uncontrollable magnitude, we cannot define a normal which does not vary according to the alternative we may have in mind.

• • •

"Finally we must face the fundamental question: what reason is there for believing that the notion of normalcy has any kind of meaning at all in the realm of science? Truly discontinuous phenomena in nature are excessively rare, particularly in biology.

• • •

"What useful purpose, then, is served by trying to convert a continuity of graded risk into a fictitious dichotomy? Normalcy is a vestigial concept left in medicine from its unscientific era. It is properly a subject for the philosopher to explore and not one to be settled by observation and experimentation which are the methods of science."

Dr. Murphy concludes that the field of medicine can offer

no aid in defining disease in terms of normal and abnormal. This means that the statutory criterion used by California for separating covered pregnancies from non-covered pregnancies is not a product of medical or scientific knowledge.

The irrationality of distinguishing between absences caused by complications of pregnancy and absences caused by routine childbirth is highlighted when that condition is compared with the other disabilites covered by the California Unemployment Insurance Code. Benefits are paid for such common conditions as respiratory ailments, heart attacks, and broken bones, disabling mental and physical conditions such as psychiatric disorders, obesity, alcoholism, drug addiction,[2] ailments caused by nicotine consumption, cosmetic surgery, attempted suicide, and even sex change operations. Sex-limited operations or conditions are also compensable, such as circumcisions, prostatectomies and menopause.[3]

When we turn to the circumstances attendant to childbirth as actually practiced in the United States, there is even less basis for distinguishing the covered from that not

[2] Benefits are paid to dipsomaniacs, drug addicts, and sexual psychopaths unles they are confined to an institution pursuant to commitment or court order. Unemployment Insurance Code § 2678.

[3] Various statutory and administrative rules ensure that only those who are truly incapacitated from performing their regular work receive benefits. Claims must be accompanied by a doctor's affidavit attesting to the existence of the disability. Unemployment Insurance Code §§ 2627(d), 2708-2710. The individual must submit to such examinations as may be required by the appellant. Unemployment Insurance Code § 2627(c). Appellant also maintains "yardstick" standards and may further investigate claims of unusual duration. In the absence of hospitalization, benefits are not paid until the eighth day of disability.

covered. No woman (or her doctor) knows when she goes into labor whether her childbirth is going to be normal or routine. With pregnancy, just as with virtually all other illnesses and surgical procedures, there is a substantial increase in the risk of serious morbidity and mortality. Pregnancy and puerperium are still among the leading causes of death for American women of child-bearing age.[4]

Second, even in the most routine of pregnancies close medical supervision and care is required. In the medical profession, pregnancy is treated as a special condition for which specialized treatment is necessary. A pregnant woman is expected to seek prenatal care, the services of an obstetrician at delivery in a hospital and a post-partum follow-up.[5] The California Unemployment Insurance Code

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[4] Warren M. Hern, M.D., "Is Pregnancy Really Normal?" *3 Family Planning Perspectives*, 5, 8, January 1971.

[5] Under a collective bargaining agreement it was held that the non-occupational sickness and accident benefits cover a post-pregnancy absence from work. In awarding the employee sickness benefits for her six week absence, the arbitrator said:

> "We may properly take 'judicial notice' that in these times and in this community (as in most others), it is usual—and generally considered imperative—that a pregnant woman is attended by a physician before, during and after confinement, and that almost all babies are delivered in hospitals. Similarly, there is no need to resort to technical or scientific sources in in order to be aware that labor and confinement result in some amount of trauma and debilitation . . . what she suffered was clearly much more than a mere trifling or passing indisposition."

The arbitrator concluded that:

> [T]he Contract section neither includes nor excludes maternity conditions. But it is fair to say that the section was written into the contract in order to assure a continuing income for employees unable to work because of physical disability. The section speaks of 'sickness benefits' and 'absence'

provides coverage for virtually every other condition of the human body which requires medical supervision and hospitalization. Labor and delivery are excluded, however, which, even in the simplest case, always require close medical monitoring.

Finally, the most normal pregnancy, which goes to term and results in a routine delivery, uniformly entails hospitalization for a period of days. There is no other condition requiring hospitalization which is not covered by the California Unemployment Insurance Code.

C. The voluntary character of the pregnancy affords no rational basis for exclusion from benefits.

In the California Unemployment Insurance Code, § 2626.2, as amended effective January 1, 1974, the adjective "involuntary" is used to qualify the noun "complication". The argument based on the voluntary character of the pregnant female's condition, as advanced in the brief of appellant (pp. 8, 19, 25-26) and the briefs of the *amici* who support appellant (GE, pp. 6-9, 15-22), is that due to the availability of contraceptives and abortion, any woman who has a child plans to have a child and hence any disability which she suffers is one she voluntarily incurs.

Assuming all pregnancies were voluntarily incurred,[8]

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due to illness; and there is no reason in logic or fairness to hold there must necessarily be a showing of a disease or malady which was morbid in nature, or which undermined the employees' constitution." (*In re Washington Publishers Association and Columbia Typographical Union*, 39 Lab. Arb. 159, 160 (1962).)

[8] But see the Brief Amicus Curiae for the IUE at pp. 64-74.

this would not serve as a rational basis for excluding disability benefits coverage. Males receive disability benefits for a variety of voluntarily incurred disabilities. The voluntariness of elective cosmetic surgery which is covered is perhaps the saliant example. (The argument advanced in the brief of GE as *amicus* (Br. pp. 6, 19, 25-26) that the purpose of the California Unemployment Insurance Code is to pay for "unexpected" disabilities is belied by the coverage of elective cosmetic surgery.)

And there is no provision in the California law which limits benefits for non-pregnancy related disabilities based on the expected character of the disability. Other disabilities for which benefits are paid under the California Unemployment Insurance Code are voluntary in the same sense as the disabilities of pregnancy. Thus, disabilities resulting from self-inflicted injuries, fights, alcoholism, drug abuse, lung cancer, emphysema and hunting accidents are covered.

The Court below was therefore correct in rejecting the allegedly voluntary character of pregnancy as justifying the denial of benefits. (App. A, pp. 19-20):

> "Pregnancy, defendant notes, is, to a large degree, voluntary, and he suggests that this would make it possible for a woman not interested in a career to abuse the disability insurance program by working a short period, becoming pregnant, and collecting a substantial award. But pregnancy-related illness and injuries, such as those suffered by plaintiffs Aiello, Armendariz, and Johnson are not voluntary, and they, too, are excluded from coverage. Moreover, every other voluntary disability, including, for example, cosmetic plastic surgery, is included. Thus, it is difficult to be-

lieve that pregnancy-related disabilities were excluded to avoid abuse. If that was the legislature's purpose, the present scheme achieves it so irrationally that it cannot be upheld."

II. The purposes of the California statutory disability insurance law afford no basis for excluding pregnancy-related-disabilities on the ground that they are costly to cover or that they are not sudden unexpected disabilities because the statute excludes no other disabilities on those grounds and such exclusion is inconsistent with the basic purpose of the law.

The California temporary disability statute states (§ 2601):

> "The purpose of this part is to compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury and to reduce to a minimum the suffering caused by unemployment resulting therefrom. This part shall be construed liberally in aid of its declared purpose to mitigate the evils and burdens which fall on the unemployed and disabled worker and his family."[7]

A woman who is not physically able to work because of pregnancy-related conditions requires sickness and accident insurance just as much as any other employee who cannot work.[8] Obviously, as a result of pregnancy, she may incur

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[7] See also California State Journal, Jan. 23, 1946, p. 227 (message of then Governor Warren).

[8] In March 1967, 61.3% of wives in the labor force had husbands who earned less than $7,000 per year. 1969 *Handbook on Women Workers*, Women's Bureau Bulletin 294, U.S. Dept. of Labor, p. 34. Thus, female workers like their male counterparts work as a matter of necessity and not to secure superfluous luxuries.

substantial expenses such as physician's and hospital bills, payments for someone to assume the household duties the disabled woman would otherwise perform herself, and if she delivers the baby, the cost of a new person to support.

The insurance principle which the California Unemployment Insurance Code applies to temporary disabilities, requires the inclusion of all disabilities from child birth and the complications of pregnancy. The concept of group insurance is to spread the risk of disabilities among a large number of people, some of whom will have no disabilities at all, and others who will suffer from only one of the many types of disabilities which are covered. No one would suggest eliminating sickle cell anemia because only Blacks can contract the disease. Similarly, heart ailments are included even though they affect men to a much greater degree than women. Prostatitis is included though only men are affected. Coverage of pregnancy related conditions follows even though only female employees are disabled thereby.

In sum, when the purposes behind the California temporary disability plan are reviewed, it becomes clear that the focus is on disabilities which prevent employees from working, not on whether there is a condition which fits within a narrow definition of the terms "illness" or "injury".

A. The cost figures submitted by the state of California and various amici are grossly exaggerated.

There is no data available from which the cost of covering all pregnancy-related disabilities can be compared with the cost of covering other disabilities. The court below

correctly stated (App. A, p. 11):

> "Unfortunately, it is impossible to determine if the cost of including these disabilities is substantially greater than the cost of including other disabilities because, according to defendant, no statistics are available indicating the cost to the program of paying benefits on account of various disabilities presently covered."

The figures offered by appellants and *amici* make no effort to distinguish between the cost of covering the abnormalities and complications of pregnancy and covering the very short period which women will be disabled by a normal pregnancy. Since California has, both by judicial decision construing its statute as it existed at the time this suit was instituted and by amendment, now covered only disabilities due to abnormal or complicated pregnancies, the figures cited are not in point.

Having regard to disabilities caused only by normal pregnancies, the figures offered by appellant and *amici* are far higher than a reasonable person knowledgable in the field could anticipate. There are seven obvious respects in which the figures overstate:

(1) The figures are based on experience under mandatory leave plans where employees were forced by the employer to go on unpaid leave without regard to disability;

(2) Periods of absence based on abnormal or complicated pregnancies are included;

(3) The figures are based on the assumption women will malinger rather than draw benefits only during a period of actual disability;

(4) It is also assumed that physicians will certify women as disabled without regard to the truth;

(5) Out-of-date birth rates are used, ignoring the fact that birth rates have fallen substantially over the past two decades;

(6) The figures do not reflect the well-established fact that women who work have fewer babies than the national birth rate and that as women have opportunities for advancement and higher wages they have still fewer babies;

(7) The benefit rates used fail to reflect that women have average wage rates only 60% as high as males and accordingly draw benefits at the bottom of the scale of benefits.[9]

(1) There are no known statistics with respect to the average period of disability due to pregnancy and childbirth.

California's estimate that the cost of covering pregnancy would be an additional 120.2 million assumes that the average duration of disability for pregnancy would be 13 weeks (Brief for Appellant, pp. 30-31). This is in striking contrast with the testimony of medical experts fixing two to three weeks as the average period of disability for the 85 to 95 percent of women who can work until they go into labor and fixing the period for return to work on an average of two to three weeks after childbirth.[10]

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[9] Points 2, 3, 5-7 are covered in the Brief Amicus Curiae of the IUE at pp. 88-100, since the relevant data is contained in cases to which that Union is a party.

[10] See testimony of medical experts quoted in the Appendix to the Brief of the International Union of Electrical, Radio and Machine Workers, AFL-CIO, as Amicus Curiae in *Cleveland Board*

Appellant's survey of obstetricians in California conducted for the purposes of its brief to this Court in this case brought the following responses to "the question of the reasonable duration of inability to work due to usual maternity care with normal delivery for sedentary and light occupations": 4 days (Dr. Stephen L. Sankerson, Arcala, Calif., Appendix D, p. 11 to Brief for Appellant), 2-3 weeks (Dr. Robert Creasy, Associate Professor, Department of OB/GYN, University of California Hospital, *id.* Appendix B, p. 7) and one month (Dr. Mary Lou Judy, Menlo Park, Calif., *id.*, Appendix B, p. 7).[11]

Studies of comparative exercise efficiency of pregnant and non-pregnant women conducted during the 1960's showed that pregnant women between the 24th and 35th weeks of pregnancy have a greater exercise efficiency than non-pregnant women or women during the earlier months of pregnancy. Joseph Seitchik, Body Composition and Energy Expenditure During Rest and Work in Pregnancy,

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of Education v. *LaFleur*, No. 72-777. The number of women who have disabling complications was fixed at 2% to 3% by Dr. Hellegers (id. at 22a-23a). Dr. Donovan fixed all complications during all trimesters at 15% but testified not all of the 15% would be necessarily disabling (p. 30a). Dr. Keetels testified that only 5% to 10% of pregnant women have any complications (p. 52a); with respect to the period of disability following childbirth, all the doctors were agreed on a minimum of 7 to 10 days, an average of two to three weeks, and a maximum of 6 weeks (Hellegers, pp. 17a, 19a, 26a, 27a; Wilbanks, pp. 44a-45a; Donovan, pp. 33a-34a, 35a, 36a, 42a; Keetels, p. 56a).

[11] The Appendix to the Brief of the Appellant does not disclose the identity of those who gave other responses nor the nature of the work to which the responses were applicable.

American Journal of Obstetrics and Gynecology, Vol. 57, page 701, March 1, 1967, Michael Bruser, Sporting Activities During Pregnancy, *Journal of Obstetrics and Gynecology, Vol 32,* p. 72 (November 1968). Later studies have established that the increased cardiac output in pregnancy results in a "hyperkinetic state of pregnancy" which instead of slowing down at the 35th week, "is sustained until delivery." C. A. Guzman and R. Cajean, Cardiorespiratory Response to Exercise During Pregnancy, *American Journal of Obstetrics and Gynecology,* October 15, 1970, pp. 600-605. These studies confirm the responses to the questionnaires sent out by appellant that the usual female is fully competent to continue her job until the onset of labor.

Jacqueline S. Gutwillig, Chairperson, Citizens' Advisory Council on the Status of Women, Job-Related Maternity Benefits, address given at the Conference of Interstate Association of Commissions on the Status of Women, in St. Louis, June 19, 1971, stated (pp. 12-13):

> "We have been unable to find reliable data on the average time women can be expected to be away from the job for childbirth under policies that do not set arbitrary periods of absence. There are some data as to the average amount of time off under certain conditions; but they all involve employers who have required, or put pressure on, women to be off for longer periods before childbirth than necessary. I would not expect that we would know for 3 or 4 years—until women and employers get used to having women make their own decisions—the average time women will be off; certainly the average period will be shorter than it is today. One indication of the length of absence comes from New Jersey data. The New Jersey tem-

porary disability insurance laws limit payments of temporary disability insurance to 4 weeks before and 4 weeks after childbirth. Complications of pregnancy before and after this period are not compensable. The average number of weeks compensated for pregnancy claimants who have recently been in the labor force is 6.9 weeks. For claimants who are unemployed, the period is 7.4 weeks. The Department of Labor and Industry, which administers this law, states in a March 1970 report that it was the practice of a good many employers to lay off employees significantly earlier than 4 weeks prior to expected birth, resulting in a high proportion of the claims for pregnancy coming from 'unemployed' women. These unemployed women would naturally apply for compensation for the full 4 weeks before childbirth even though able to work. Even so the average period of compensation is 7.4 weeks, indicating that most took off less than the full 4 weeks allowed after childbirth."

Until this Court decided the *LaFleur* case employers refused to follow decisions of lower courts and administrative agencies holding that women had a legal right to work during pregnancy as long as they were medically certified as able. Instead the general practice was to place women on unpaid leave and treating them as disabled even though there was no medical basis for doing so.[12] Thus, the in-

[12] See Prentice Hall, Personnel Management Policies and Practices Report Bull. 25, Vol. XIX, P-H Survey: Maternity Leave Policies Due for a Change?, p. 456, 458, reporting on a summary to which 108 firms responded, stated:

"In 35% of responding companies, the policies spell out how long a pregnant employee can continue working. Of these firms, 6 months is the most commonly-mentioned cut-off date, with 7-7½ months a close second. Several office firms set an 8-month deadline. A number of plants say 4-5 months."

dustrial experience is not enlightening here.

The argument in Appellant's Brief, p. 31, respecting actual experience, is based solely on that very small minority of cases where complications are present because it is only in such cases that benefits are being paid. The period of disability in cases involving claims made against the California fund for complications which have arisen since the decision below includes the periods of disability of all women who had anemia, diabetes, embolism, heart disease, hypertension, phlebitis, phlebothrombosis, pyelonephritis, thrombophlebitis, vaginitis, varicose veins, venous thrombosis, puerperal infection, eclampsia, caesarian section delivery, ectopic pregnancy and toxemia (§ 2626.2). Since these conditions, according to medical experts, occur in only 5 to 15 per cent and are disabling in less than half of this 5 to 15 per cent, a projection based on the average duration in such cases is unsound in the extreme.

So far as we can ascertain there are no figures available which afford a basis marking a reasonable determination as to the average period of disability from childbirth and pregnancy-related disabilities in American industry if employers are required by law to accord the same sick pay for disabilities occasioned by childbirth and pregnancy as for other disabilities. Were this to be required instead of placing pregnant females on leave far in advance of the expected date of birth, employers anxious to keep their sick pay costs at a minimum will require medical certification of disability. This has never happened before.

(4) The birth rate used by the cost estimates is overly high as in subsequent years that rate has fallen substantially.

The appellant (Br. p. 35, fn. 57) cites the 1947-1952 experience under the U.S. Railway Unempl. Ins. Act as showing that 5.3% of the females covered became pregnant each year. The birth rate in 1947 was 27 per 1000 and ranged from 27 to 25 per thousand during the period 1947-1952. In 1968 it was 17.5; in 1970, 18.2 and in 1971, 17.3. Throughout the sixties and early seventies there was a steady and dramatic decline in the birth rate.[13] Indeed, the latest studies indicate that this country's birth rate is now below that "necessary for the population to replace itself."[14]

B. The experience under the California Unemployment Insurance Code that there is a greater ratio of costs to contribution for female workers than for male workers is due to the fact that the female worker in California receives less than 60% as much earnings as the male receives.

The appellant argues that pregnancy-related benefits should not be included because there is already a disproportionate ratio of benefits to contributions for females as compared with males (Br. pp. 26, 35). This difference in ratio of benefits to contributions is due to the lower pay rates of women. The California Unemployment Insurance Code provides for a graduated scale of benefits ranging from a $25 a week benefit for an employee earning $75 to $524.99 in the highest quarter, to $119 per week for an

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[13] The Commission on Population Growth and the American Future, *Population and the American Future*, signet ed., 1972, pp. 11-12, 14.

[14] "Birth Rate Dip Already Changing U.S. Society," Washington Star News, March 5, 1974, p. A-3.

employee earning $2,850 or more in the highest quarter, § 2653. This system of smaller benefits in proportion to earnings as earnings increase combined with a system of contributions at a uniform rate of 1% of wages until $85 has been collected each year (§§ 984, 985, 2401), necessarily means that those in lower wage brackets get more money benefits than they pay in as contributions, whereas the opposite is true of those in higher wage brackets.

The wage gap between men's and women's wages which results in women receiving only 60% as much wages as men nationwide [15] is even more marked in California.[16]

When male and female workers in California are compared by wage level, as to the length of their absences from work, males have a higher average duration in weeks absent than females in six out of twelve age group comparisons. See Stefan A. Riesenfeld, *Temporary Disability Insurance*, University of Hawaii, Legislative Reference Bureau, Report No. 1, 1969, pp. 84-86:

> "It is likewise demonstrable that wage levels exert an important effect on the average duration of benefit payments or, at least, show a significant correlation

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[15] See U.S. Dept. of Labor, *Fact Sheet on the Earnings Gap, 1973.*

[16] Comparative earnings between male and female in California in the latest year for which figures were available, 1969, are with respect to earners working 50 to 52 weeks, male $9,728, female $5,637; for all earners (not only those working 50 to 52 weeks) male $8,552, female $4,237. These are figures from standard metropolitan statistical areas of 250,000 or more, U.S. Dept. of Commerce, 1970 Census of Population, Characteristics of the Population, Vol. 1, Part 6, California, Section 2, issued April 1973, California 6-1773 and 6-1841.

with average duration. This holds true for male as well as female recipients. Both California and New Jersey data support this proposition.

"The California study classified male and female recipients into workers with base period earnings of less than $4,000 and workers with base period earnings of $4,000 or more. It also divided both categories into age groups. The findings showed that the difference in average duration of claims by male and female disabled in different age groups tended to be greatly minimized or even reversed if the earning levels of recipients are taken into account. The results of the California study are tabularized in Table 29. They were summarized by the report with the sentence:

'When employment status and base period wages are held constant, there is very little difference in average duration between male and female claimants.[44]'

"The New Jersey study presented the relation between average weekly benefits and average duration of disability for male and female recipients.[45] Again the data show that there is an inverse correlation between average weekly benefits and average durations. In other words, since the average weekly benefit depends

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"[44] California, Joint Committee on Unemployment Compensation Disability Insurance, p. 81. The report found that the composite average duration of claimants with less than $4,000 annual income was 8.1 weeks for males and 8.0 weeks for females, while in the $4,000 and more wage bracket the respective average durations were 6.5 and 6.9 weeks, *Id.* at p. 51.

"[45] New Jersey, Department of Labor and Industry, Division of Employment Security, *Temporary Disability Insurance Cases in 1964*, Table 40, p. 74.

on the wage level, the analysis proves that the claims of low-wage earners are subject to a greater average duration. Table 30 shows the relation for both male and female claimants. The values for each income level indicate the perhaps surprising result that in all wage brackets, except in the highest, the average duration of benefit payments of women is more favorable than that of men."

Table 29 discussed in the above quotation is as follows (id., p. 87):

"Table 29

"EFFECT OF WAGE ON AVERAGE DURATION
(WEEKS)
BY SEX AND AGE
CALIFORNIA EMPLOYED DISABLED
1964

"Income	Under 25		25-44		45-54		55-64	
	Male	Female	Male	Female	Male	Female	Male	Female
"Under $4,000	5.6	4.8	7.1	7.6	8.6	8.6	10.9	9.7
"$4,000 and above	4.5	4.1	5.3	6.4	6.7	7.0	8.3	8.2

	65 and Above		Composite	
	Male	Female	Male	Female
"Under $4,000	13.0	12.8	8.1	8.0
"$4,000 & above	11.0	11.9	6.5	6.9

"Source: Joint Committee on Unemployment Compensation Disability Insurance, Final Report, Table 17, at p. 80 (1967)."

Table 30 discussed in the above quotation is as follows (*id.*, p. 89):

"Table 30

"NEW JERSEY

"EFFECT OF WAGE (AS REFLECTED IN WEEKLY BENEFIT RATE) ON DURATION (WEEKS) BY SEX —EMPLOYED DISABLED 1964

"Sex	Under $20	$20-$24	$25-$29	$30-$34	$35-$39	$40-$44	$45-$49
"Male	13.88	11.40	11.07	10.19	9.36	8.36	7.35
"Female	11.03	10.02	9.54	9.12	8.24	8.00	7.72

"Source: State of New Jersey, Department of Labor and Industry, Division of Employment Security, Temporary Disability Insurance Cases in 1964 (Research Series No. 19), Table 48, p. 74 (1967)."

Moreover, the incidence of days of bed confinement and of restricted activity due to pregnancy is small compared to other disabling causes for which California pays temporary disability benefits. During 1972 the number of days of bed disability per 100 persons per year for deliveries and disorders of pregnancy and puerperium were 20.4 as compared with male days in bed for respiratory disease 185.2, for influenza 101.4, for common cold 39.9 for infective and parasitic disease, 36.3.[17] Likewise, the days of restricted activity in thousands were 47,273 for deliveries and disorders of pregnancy and puerperium as compared to those for males which were 384,120 for respiratory conditions, 176,568 for influenza, 176,018 for common cold, 78,706 for

[17] U.S. Dept. HEW, Vital and Health Statistics: Data from National Health Survey, Current Estimates from Health Survey 1972, Series 10, No. 851, Table 4, p. 11.

infective and parasitic disease and 114,097 for fractures.[18]

The Group Health Association Inc., from computer runs of its 1964 data concluded,[19] "At no age level did the combined incidence of pregnancy and treatment of female sex organs account for most of the difference in incidence rates between men and women."

Group Health figures show that the average number of days of hospitalization per pregnancy (4.4) is much shorter than many of the conditions for which males are hospitalised. The average hospital stay for diseases of male genital organs is 8 days, for diseases of the circulatory system 12 days, for injuries and adverse effects of external causes 6.7 days, for diseases of bones and organs of movement 10.1 days.[20]

Studies of alleged greater turnover rates and greater absentee rates for women have repeatedly shown that the higher rates were due to lower rates of pay and less desirable jobs for females. When males and females are compared on the basis of the same job and wage levels, there is no overall pattern of greater turnover or greater absenteeism for females.[21] Even without regard to com-

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[18] *Id.*, Table 3, p. 10.

[19] Helen Hershfield Avnet, *Physician's Service Patterns and Illness Rates: A Research Report on Medical Data Retrieved from Insurance Records*, Group Health Ins., Inc., 1967, Table 162, p. 428.

[20] *Id.*

[21] U.S. Dept. of Labor, Wage and Labor Studies Administration Facts About Women's Absenteeism and Labor Turnover, p. 6: "the generalization made in the report that women employees had more absences than men employees was based on the overall data, which did not take account of the fact that relatively more women than men were employed in the low grades," and at p. 4, "among

parable jobs, there have been one or more years in which male absenteeism nationwide exceeded that of females.[21] In 1970, 1.55 percent of women in the full time employed labor force were absent from work because of illness for an entire week compared with 1.85 percent of the men.[22]

C. That there would be a substantial cost to treat males and females equally is not relevant to a determination that different treatment constitutes discrimination because of sex.

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certain groups—for example, clerical workers and government workers—women had a lower rate of illness absence than men." Then Secretary of Labor Willard Wirtz testified before the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare. Hearings Equal Pay Act of 1963, 88th Congress, 1st session, S. 882 and S. 910. April 2, 3, 16, 1963, p. 17 that:

> "any comparison of wage costs should of course be based on similar jobs. Many of the figures cited by those who make the charge (that women are more costly to employ) are not careful to make this distinction. If we look at the quit rates for skilled professional and managerial workers . . . we find it is low for both men and women. Similarly, for both men and women, the highest quit rates occur among sales, services and unskilled workers. The fact that large numbers of women are in these latter groups and relatively few in the skilled groups accounts to a large extent for the unfavorable generalization about the labor turnover rates of women workers."

[21] U.S. Dept. of Commerce, Statistical Abstract of the United States (GPO 1972) p. 79, Table 117, Days of Disability by Type and Sex of Patient, 1960 to 1970.

	"Days Per Person			
"Work-loss days	1960	1965	1969	1970
"male	5.5	5.7	5.1	5.0
"female	5.6	5.6	5.2	5.9"

[22] Women's Bureau of the Canadian Federal Labor Department called "Women in the Labor Force—1970—Facts and Figures."

The court below correctly held that costs were irrelevant to a determination that the exclusion of pregnancy-related disabilities violated the equal protection clause (App. A, pp. 11-12):

> "Regardless of the effect the inclusion of pregnancy-related disabilities would have, these disabilities cannot be excluded merely because the cost of including the entire group might be prohibitive. While some women suffering pregnancy-related disabilities will have large claims, not all pregnant women will. • • • [B]y excluding all pregnancy-related disabilities on the grounds that these claims will be large, the state denies pregnant women benefits on the basis of generalities and stereotypes contrary to the requirements of the equal protection clause."

Even where the disparity in benefits between males and females is less than the difference in costs between males and females, the courts have held that the existence of a difference in cost was not a defense to a determination of sex discrimination in violation of Title VII. In so ruling the court in *Taylor* v. *Goodyear Tire & Rubber Co.*, 5 EPD, ¶8545 (U.S.D.C.N.D.Ala. 1972) stated:

> "It was also established that the percentage of the difference in the costs of sickness and accident benefits for the female and male employees exceeded the percentage of the difference in benefits in every year between 1965 and 1970.
>
> "However, the Court is of the opinion that these facts do not constitute a legal justification for the differential in benefits. In the first place, the higher cost of providing these benefits for female employees cannot be regarded as proof that the cost of providing these benefits

> for each of the female employees was higher than the cost of providing them for each of the male employees. In the second place, the EEOC Guidelines provide in unequivocal terms that 'It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.' EEOC Guidelines on Discrimination Because of Sex, 29 CFR § 1604.9(e). The differential in the amount of benefits was unlawful under Title VII, and the plaintiffs are entitled to relief."

Applying the reasoning of the above case requires the holding that sex stereotypes about the length of time women are disabled by childbirth, or fail to return after childbirth cannot be the basis of a decision. The fact that some women may be disabled for longer periods because of childbirth than the usual disability of males affords no basis for permitting a system to continue which denies benefits to all females, including those whose attendance pattern, including her short absences for childbirth, are indistinguishable from the usual male attendance pattern.[34]

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[34] See also *Hays* v. *Potlatch Forests, Inc.*, 465 F.2d, 1081, 1084 (8th Cir. 1972) (cost of giving overtime to males no defense).

CONCLUSION

For the above stated reasons, as well as those stated by the appellees, the decision below should be affirmed.

Respectfully submitted,

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March, 1974

APPENDIX

Resolutions concerning California's unemployment disability insurance system adopted by the Ninth Convention of the California Labor Federation, AFL-CIO (held at Los Angeles, California, August 21-24, 1972):

"Unemployment Disability Insurance

"California's worker-financed unemployment disability insurance system should be improved by increasing the maximum weekly benefit; including pregnancy; and raising the taxable wage base when necessary.

"California's unemployment disability insurance system is now 26 years old. Entirely worker-financed, it provides wage-related benefits to workers who suffer non-occupational illnes or injury.

"California is only one of five states having a disability insurance program. In 1971, the state Legislature increased maximum weekly benefits under the program from $87 to $105. This action has produced more than $18 million in new wage-replacement and hospitalization benefits to workers unemployed because of a nonoccupational injury or illness.

"The program is financed by a one percent tax on earnings up to $8,000 a year. We support an increase in this tax base in order to provide higher and better benefits and oppose any efforts to increase the tax rate.

"Specifically, we support:

"1. A significant increase in the maximum weekly benefit so most workers suffering a non-occupational illness or

injury will receive two-thirds of their normal weekly wage.

"2. Including pregnancy within the program.

"3. Significantly increasing the taxable wage base above the present level, when necessary, in order to finance improved benefit levels and coverage.

"Adopted."

• • • •

"Disability Benefits Resulting from Pregnancy

"Resolution No. 39—Presented by Los Angeles County Federation of Labor, AFL-CIO, Los Angeles.

"Whereas, Absence from work for reasons of pregnancy is caused by physical disability and there is no reason why in the economic sense there should be a distinction between pregnancy and any other physical disability; and

"Whereas, Loss of employment under such circumstances should be compensated by disability benefits; therefore be it

"Resolved, That the Ninth Convention of the California Labor Federation, AFL-CIO, introduce legislation to amend the Unemployment Insurance Code to include pregnancy among the disabling factors for which disability benefits should be payable.

"Referred to Committee on Legislation.
"Adopted."

FILE COPY

No. 73-640

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

DWIGHT GRIGGS, *Appellant*,

v.

CASKEY ALLEN, Individually and on Behalf of All Others Similarly Situated, *Appellees*,

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DWIGHT GRIGGS, *Appellant*,

v.

AUGUSTINA D. ARMENDARIZ, ET AL., Individually and on Behalf of All Other Women Similarly Situated, *Appellees*.

Consolidated Cases on Appeal from the United States District Court for the Northern District of California

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BRIEF OF INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-640

DWIGHT GEDULDIG, *Appellant,*

v.

CAROLYN AIELLO, Individually and on Behalf of All Others Similarly Situated, *Appellees,*

DWIGHT GEDULDIG, *Appellant,*

v.

AUGUSTINA D. ARMENDARIZ, ET AL., Individually and on Behalf of All Other Women Similarly Situated, *Appellees.*

Consolidated Cases on Appeal from the United States District Court for the Northern District of California

BRIEF OF INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, AS AMICUS CURIAE

INTEREST OF AMICUS

The International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, hereinafter called IUE,* is an international labor organization composed

*Letters of counsel for all parties consenting to the filing of this brief have been filed with the Clerk of this Court as required by Rule 42.

of employees of manufacturers of electronic products and equipment, electrical machinery, appliances and products, machine tools and allied products. The IUE has more than 100,000 members who are female.

Testimony and exhibits in three cases to which the IUE is a party, and which are still pending undecided at the trial level, have been extensively cited, quoted and relied upon in briefs in support of appellant. Testimony and exhibits from the record in *Gilbert* v. *General Electric Co.*, U.S.D.C.E.D.Va., Richmond Division, Civil Action No. 142-72-R (for earlier reported decisions relating to procedural issues in the same case see 347 F. Supp. 1058, 59 F.R.D. 267, 5 FEP Cases 197, 986, 989, 5 EPD ¶¶ 8070, 8663, 8664, 8749), now awaiting decision by the district court, have been extensively relied upon in the brief in this Court of General Electric Company as *amicus curiae*, pp. 6-8, 12, 15-27, 40-41, 44-45, 50-51, and to a lesser extent in the brief of appellant (p. 21, fn. 26, p. 27, fn. 38, p. 31, fn. 48). Testimony from the record in *Avery* v. *General Railway Signal Corp.*, N.Y. State Division of Human Rights, Complaint Case Nos. CS-27503-72, CS-26324-72 and *Franklin* v. *Stromberg Carlson Corp.*, Case Nos. CS-27069-72, CS-27071-72, CS-27068-72 has been relied upon in the brief *amicus* filed in this Court by the National Association of Manufacturers.

The *Gilbert, General Railway Signal* and *Stromberg Carlson* cases involve an employer-established temporary disability plan and thus the legal issues arise under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, and state FEP laws, rather than, as here, the equal protection clause. But the court below (App. A, pp. 6-9) based its decision

on a determination that the exclusion of pregnancy-related disabilities constituted discrimination because of sex. And that, too, is the issue in each the *Gilbert, General Railway Signal* and the *Stromberg Carlson* cases.[1]

The IUE is also a party plaintiff in two other cases now pending and not yet decided in the federal district courts presenting the issue under Title VII of the denial of sick benefits for pregnancy-related disabilities: *Grogg* v. *General Motors Corp.*, U.S.D.C.S.D.N.Y., 73

[1] *Gilbert* v. *General Electric Company*, U.S.D.C.E.D.Va., Richmond Division, Civil Action No. 142-72-R is a class suit brought by the IUE, its Local 161 and 43 female employees, which presents the issue of whether GE discriminates because of sex in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, by cancelling all temporary disability insurance when a female misses any work due to pregnancy and refusing to provide income maintenance during such absence even though the absence is prolonged by non-pregnancy related disabilities when GE provides such insurance coverage for the first 31 days of any other leave and of layoff and provides income maintenance during absences due to other disabilities. *Avery* v. *General Railway Signal Corp.*, N.Y. State Division of Human Rights, Complaint Case Nos. CS-27503-72, CS-26324-72 and *Franklin* v. *Stromberg-Carlson Corp.*, Case Nos. CS-27069-72, CS-27071-72, CS-27068-72 present issues as to whether the following constitute unlawful discrimination because of sex in violation of the New York State Human Rights Act, N.Y. Executive Law, Art. 15, Sec. 296: requiring a pregnant employee to go on unpaid leave during the latter months of pregnancy and remain on unpaid leave following childbirth without regard to ability to work; cancellation of Blue Cross and Blue Shield at the time employee goes on leave, depriving employee of coverage for prenatal care and delivery unless employee assumes payment of premiums although employer pays all premiums during periods of leave for other disability and covers prenatal and delivery expenses for wives of employees; no income maintenance for absences due to pregnancy-related disabilities or income maintenance for shorter periods than provided for other absences.

Civ. 63;[2] *Eberts* v. *Westinghouse Electric Corporation*, U.S.D.C.W.D.Pa., Civ. Act. No. CA-74-113.[3]

Efforts of IUE to obtain sick pay benefits for female employees date back twenty years. Prior to the enactment of Title VII of the Civil Rights Act of 1964, 42 USC § 2000e, and the parallel state fair employment practice statutes, the IUE had attempted through collective bargaining to secure sick pay for pregnancy-related disabilities. Subsequent to EEOC decision No. 71-1474, CCH-EEOC Dec. Par. 6221 (1971), holding that failure to treat disabilities arising out of pregnancy the same as all other disabilities for purposes of sick pay, constituted discrimination because of sex, the IUE undertook a vigorous campaign to persuade the employers with whom IUE bargains to conform to that decision.

As collective bargaining agent, the IUE has during the past two years been engaged in negotiations with approximately 400 employers for the purpose of securing for female employees the right to all the same benefits as other disabled employees for periods of dis-

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[2] *Grogg* v. *General Motors Corp.*, U.S.D.C.S.D.N.Y. 73 Civ. 63 presents the issue of whether imposing a maximum period of 6 weeks on payment of temporary disability benefits for pregnancy-related disabilities when benefits are payable for other disabilities up to 52 weeks, imposing mandatory maternity leave and excepting tubal ligations from an otherwise all inclusive medical and hospital insurance plan violates Title VII.

[3] *Eberts* v. *Westinghouse Corp.*, U.S.D.C.W.D.Pa. Civ. Act. No. 74-113 presents the issue of whether failure to pay disability benefits for pregnancy-related disabilities, as well as discharging or coercing pregnant female employees to resign, refusing reinstatement following childbirth, cancelling their accrued seniority and pension credits, refusing to allow them accrual of seniority and pension credits, all contrary to the practice respecting other disabilities, violate Title VII.

ability due to childbirth or the complications of pregnancy.

With some employers, the IUE has been completely successful.[4] Still other employers have entered into standby agreements with the IUE making retroactive to the date of the signing of the agreements of rights of employees with respect to sick pay for periods of absence due to childbirth or other pregnancy-related disability should the courts in cases involving other employers make a final resolution of the issue in favor of pregnant employees.

IUE's lack of success as to other employers has resulted in the filing by IUE, its affiliated locals or members of charges with the Equal Employment Opportunity Commission, hereinafter called EEOC, and state fair employment practice agencies and the filing of suits in the federal district courts, alleging that various policies and practices of employers in singling out pregnancy for special treatment constitutes unlawful sex discrimination in violation of Title VII or similar state law.

As the foregoing indicates, the IUE's interest is primarily in the private sector, rather than the public

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[4] E.g., Employers agreeing to pay temporary disability benefits for pregnancy-related disabilities in the same amounts and for same duration as for other disabilities: Plans with 26 weeks' maximum duration: Central Industries, Chandler, Ind.; Lawrenceville Industries, Lawrenceville, Ill.; TRW, Inc., Philadelphia, Pa.; plans with 13 weeks' maximum duration: Airco Speer Carbon Graphite, St. Mary's, Pa. ($55 but not in excess of 70% average weekly earnings); Cooperative Services, Inc., Detroit, Mich. ($70 to $130); Duncan Electric Co., Lafayette, Ind. ($35 to $50); Elcon Systems, Inc., Detroit, Mich. ($70 to $130); and ITT Electrical Optical Products Division, Roanoke, Va. ($50).

sector. All of the cases in which IUE is involved arise under Title VII of the Civil Rights Act of 1964, as amended, 42 USC 2000e or similar state legislation, rather than under the Fourteenth Amendment. It is therefore possible that the instant case could be decided by this Court on grounds which would not effect the interpretation and application of Title VII to the cases to which IUE is a party. However, the judges below framed the issue in the case in terms of a sex discrimination standard which might be equally applicable under both Title VII and the Fourteenth Amendment. The position briefed by appellant and by the various *amici* who support appellant, similarly intertwines the two. It is for this reason that the IUE has determined to state its views on this case to this Court.

OPINIONS BELOW

The opinion of the three-judge district court which decided the case below (App. A, pp. 1-18, of Jurisdictional Statement) [5] is reported at 359 F. Supp. 792. The dissenting opinion of Judge Williams (App. A, pp. 19-28) is officially reported at 359 F. Supp. 801.

QUESTION PRESENTED

Whether a statute denying disability insurance benefits to an otherwise qualified applicant therefor, on the sole ground that the applicant's disability is related to or caused by pregnancy or childbirth, violates the equal protection clause of the Fourteenth Amendment to the United States Constitution, where the statute is part of a comprehensive state disability

[5] All references to App. A are to Appendix A to the Appellant's Jurisdictional Statement.

insurance scheme providing such benefits to individuals disabled for virtually any other reason.

STATEMENT

The suit below was filed by Carolyn Aiello, Augustina D. Armendariz, Elizabeth B. Johnson, Jacqueline Jaramillo and San Francisco Waitresses Union, suing on their own behalf and on behalf of a class composed of all women residing in California who, but for the fact that their disability is due to illness or injury caused by or arising in connection with pregnancy, were or would be entitled to receive disability insurance benefits from the State of California, pursuant to the California Unemployment Compensation Disability Act (App. pp. 4-5).[6] The Director of Human Resources Development of the State of California, the official charged with the state-wide administration of the California Unemployment Compensation Disability Act, was named as defendant (App. A, p. 5). The complaint alleged that § 2626 of the California Unemployment Insurance Code, which contains the language excluding pregnancy-related disabilities, violates the equal protection clause of the Fourteenth Amendment (App. A, p. 11).

Because the complaint requested an injunction restraining the enforcement of a state statute, a three-judge district court was convened pursuant to 28 USC §§ 2281 and 2284 (App. A, p. 2).

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[6] Only Carolyn Aiello sued originally in the federal district court. The other plaintiffs initially filed a petition for a writ of mandate in the California Supreme Court, which was removed at the request of the Attorney General of the State of California from the state to the federal court and consolidated with the *Aiello* suit (App. A, p. 2, fn. 1.

The complaint alleged and defendant did not in his answer deny, the following facts:

Two million California women are presently insured under the California State Disability Insurance Plan, which is financed by a mandatory contribution of approximately one percent of their earnings each pay period (App. A, p. 5). As a result of § 2626 excluding pregnancy-related disabilities from coverage, over 200,000 women for years were denied benefits to which they would otherwise be entitled (App. p. 6).

Every nonwork-related disability, with the sole exception of pregnancy-related disability, is compensable under the state disability insurance laws. Thus compensable disabilities include illness or injury arising from sex change operations, attempted suicide, circumcision, prostatectomies, alcoholism, and cigarette-caused lung cancer (App. A, p. 2).

The plaintiff Aiello in 1972 lost time from work from June 21 to July 20, 1972 as a result of surgery necessitated by an ectopic pregnancy (App. A, pp. 6-7).

The plaintiff Armendariz is a 29 year old married woman who is the sole support of herself and her eight month old son. She lost time from work from May 9 to May 28, 1972 due to a miscarriage (App. A, pp. 7-8).

The plaintiff Johnson lost time from work from May 22 to July 10, 1972 due to a tubal pregnancy which required surgery to save her life (App. A, p. 9).

The plaintiffs Aiello, Armendariz and Johnson each filed claims for State Disability Insurance Benefits which were denied solely because of the pregnancy exclusion contained in § 2626.

The plaintiff Jaramillo, at the time suit was instituted, was a 21 year old woman who was eight months pregnant and except for her husband's educational expenses, was the sole support for herself, her husband and her expected child (App. p. 10). In her complaint she alleged she planned to continue to work until her child was born and to return to work as soon thereafter as her doctor permitted because her family had no other means of support (App. A, p. 10).

The court below granted the plaintiffs' motion for summary judgment and held that the challenged California statutory provision excluding pregnancy-related disabilities from benefits due for all other disabilities violated the equal protection clause (App. A, p. 17). An injunction was issued enjoining the defendant from denying benefits in reliance on § 2626 of the California Unemployment Insurance Code and requiring the defendant to consider and grant the claims of the individually named plaintiffs without regard to the pregnancy exclusion (App. A, p. 18).

While the suit was pending in the district court and unknown to the court or the litigants, the California Court of Appeals for the Second Appellate District construed § 2626 of the California Unemployment Insurance Code as not excluding from state disability benefits, disabilities arising from complications of pregnancy. *Rentzer* v. *California Unemployment Insurance Appeals Board,* 32 Calif. App. 3d. 604 (May 29, 1973). Under this decision the plaintiffs Aiello, Armendariz and Johnson were entitled by statute to disability benefits. The brief for appellant (p. 7) asserts that based on the *Rentzer* decision, the plaintiffs Aiello, Armendariz and Johnson have now been paid the disability benefits which they claimed and that only plaintiff Jaramillo has not been paid benefits.

Also, on October 1, 1973, § 2626 was amended, effective January 1, 1974 so as to make state disability benefits payable except in case of absence due to a normal childbirth and recovery therefrom, Assembly Bill 809, quoted in the Jurisdictional Statement, p. 7, fn. 7.

SUMMARY OF ARGUMENT

Critical to the achievement of equal pay and nondiscriminatory job opportunity for female workers is the elimination of the employer's freedom to force long periods of absence from employment based on pregnancy. The protection of women workers from unwanted separation from the work force on account of child bearing, although in theory assured by the rationale of *Cleveland Board of Education* v. *LaFleur*, Nos. 72-772, 72-1129, decided January 21, 1974, in practice requires that employers be subject to the incentive not to take advantage of temporary disabilities by needlessly imposing long absences. The California law requiring the payment of temporary disability benefits affords the incentive in all instances of male temporary disabilities.

I. The historical background of the California temporary disability insurance program and the context in which that program has been amended by the California legislature establish that the exception of disabilities arising from normal childbirth was based on unfounded sex stereotyped concepts of women and their weak political and economic bargaining power. Prior to the adoption by the California legislature in 1946 of the original temporary disability legislation in California, there had been a uniform history both in Europe and in this country of treating disabilities from childbirth as within the coverage of statutory temporary disability insurance programs.

Beginning with the inclusion of coverage of time lost from work because of normal childbirth as a sickness on the same basis as other sicknesses in the workers sickness insurance act adopted in Germany in 1883, the European countries during the late 1800's and early 1900's adopted similar legislation treating normal childbirth as a sickness for purposes of temporary disability insurance. Early legislative efforts in the United States followed the same pattern.

Industry in this country opposed adoption of a temporary disability program as part of the state or national social security program. Instead, industry beginning in the 1920s adopted a fringe benefit program which paralleled European social security in all respects except for failure to include coverage of pregnancy-related disabilities on the same basis as other disabilities.

The first state act, that of Rhode Island, adopted in 1942 contained no provision dealing with pregnancy as such, and the Rhode Island statute was improperly administered to pay benefits to all pregnant women throughout pregnancy without regard to disability. The only federal legislation, the Railroad Unemployment Insurance Act, defined sickness to include a day of disability due to pregnancy. The Civil Service Act, as administered by the Civil Service Commission, treats persons absent from work because of pregnancy-related disabilities as entitled to accrued sick pay. EEOC and state FEPs, courts, and arbitrators have ruled that failure of private employers to treat childbirth and after disabilities from pregnancy the same as other temporary disabilities for purposes of disability benefits constitutes unlawful discrimination because of sex.

II. The language and purposes of the California Unemployment Insurance Code would embrace pregnancy-related disabilities but for the express exception contained in the statute. Childbirth, even when it is routine and planned, is a sickness or illness within both the lay and medical use of the term illness. Having regard to the purposes of the legislation, pregnant workers are equally, if not more, in need of income maintenance while disabled from work than other employees. Cost is not properly a basis for sex-based classification. But if cost were properly considered the estimates made by supporters of the law are grossly overstated and rest on experience under a mandatory leave system which does not furnish any basis for predicting how long women will be absent if free to work as long and return as soon as medically certified. Insurance practices have been shaped by stereotyped concepts of the behavior of pregnant women and hence cannot be relied upon to justify the California legislation.

III. The California exception of disabilities due to normal childbirth constitutes a classification because of sex without any state interest justifying this classification except cost. Hence the exception is unconstitutional under principles announced by this Court in *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Reed* v. *Reed*, 404 U.S. 71 (1971); and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973).

ARGUMENT

INTRODUCTION

This brief *amicus curiae* has a twofold purpose. Preliminarily, to place to California disability statute in comparative perspective and to draw the legal inferences that inhere in that background. See pp. 18-46

infra. Second, and more basically, to draw upon the IUE's knowledge of this subject gained in its collective bargaining capacity and in the litigation it has brought on behalf of its members, primarily the *Gilbert*, *Avery* and *Franklin* cases (described at p. 2-3, supra), and all of which are pending at the trial level, to supplement the medical and economic data and legal arguments before the Court, and to correct misleading or mistaken statements concerning the records in those cases contained in the briefs of the appellant and the *amici* supporting its position, most particularly the General Electric Company. The essence of the IUE's overall position is stated in the brief *amicus curiae* of the AFL-CIO. Thus, in developing the second point addressed herein, the theory of the Federation's argument will be followed, referred to, and supplemented (just as that brief cross references to this one with regard to the record in the cases to which the IUE is a party).

The issue here presented is the key to whether discrimination in employment by state action can be legally erased through constitutional principles barring irrational classification based on sex. The array of *amici* on each side warrants analysis of why both labor and management deem the instant issue so important. Arrayed with the appellant we have the giants of American industry and the associations which represent them: American Telephone and Telegraph Company, General Electric Company, United States Chamber of Commerce, National Association of Manufacturers, Merchants and Manufacturers Association. Although not present with a brief in this Court, General Motors Corporation[1] and Westinghouse Electric

[1] *Gregg* v. *General Motors Corp.*, USDCSDNY, 73 Civ. 63.

Corporation [8] are litigating the issue under Title VII of disability pay on an insurance basis [9] for their female employees disabled by pregnancy and childbirth.

The women in the shops have likewise filed charges of discrimination because of sex based on denial of sick pay for pregnancy-related disabilities on a scale unprecedented [10] as compared with efforts to secure equal pay or promotions, although the latter issues superficially seem to involve more money and more basic long term impact.

Management is aware that the payment of sick pay during pregnancy is the key to equal pay and promotion. As pointed out to this Court in its *amicus* brief in

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[8] *Eberts* v. *Westinghouse Corp.*, USDCWDPa., Civil Action No. CA-74-113.

[9] The lack of a true insurance basis is emphasized because GM does in fact pay up to 6 weeks temporary disability benefits in instances of pregnancy-related disabilities whereas up to 52 weeks is paid for every other type of disability. While the 6 weeks is probably adequate for the vast majority of cases, the plaintiffs Grogg and Callahan had exhausted their six weeks benefits as a result of absences due to complications early in pregnancy, from which they recovered and returned to work before childbirth but had no benefits available when they were later absent due to normal childbirth.

[10] More than 500 such charges have been filed by or on behalf of women represented by the IUE. The court in *EEOC* v. *AT&T*, 365 F.Supp. 1105, 6 FEP Cases 643, 645, 658 (U.S.D.C.E.D.Pa. 1973) noted that the Communications Workers of America had been engaged in processing similar charges for its members. Two such cases brought by the Communications Workers are now pending undecided in the district courts. *Communications Workers* v. *Illinois Bell Telephone Co.*, U.S.D.C.N.D.Ill. E.D., Civ. Act. 73-C-959; *Communications Workers* v. *Southern Bell Tel. & Tel. Co.*, U.S.D.C.N.D.Ga. No. 18328.

Cleveland Board of Education v. *LaFleur*, Nos. 72-777, 72-1129, filed earlier this term, pp. 8-10:

> In its efforts to secure equal pay and promotions for its female members, IUE has had to counter the employer's traditional attempts to justify paying females lower wages than males and denying females higher paying jobs on the ground that females were less valuable as employees than males because of the repeated and lengthy absences of females from the labor force in connection with child bearing and child rearing. These same employers have been, to an undetermined extent, responsible for the transient qualities of the female labor force because they forced women out of jobs when they became pregnant, terminated all their seniority rights and often kept them out for a number of years thereafter by refusing to hire women with young children." (Footnotes omitted.)

See *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 91 S.Ct. 496 (1971) where this Court held that refusal to hire women with pre-school age children constituted sex discrimination within the meaning of Title VII.

But a decision that the equal protection clause or Title VII bars employers from refusing to employ women during pregnancy or after childbirth when they are medically able to work is not self enforcing. Only if sick pay is due for the periods off the payroll will women employees have a workable method of protecting themselves against the enforced absences for childbirth by which employers traditionally made them transient workers and then refused them equal pay and promotion because their transiency made them less desirable employees. While in California the temporary disability plan is financed entirely by a tax on the earnings of employees, in most of the United

States the employers in whole or in part bear the cost of the temporary disability benefits. If it costs employers sick pay to send women who are pregnant home and keep them home, employers will follow medical standards rather than outmoded taboos and stereotypes.[11] A pregnant woman who is disabled for her regular job but able to perform other work, will be offered by her employer the opportunity to perform other jobs just as today the employer assigns a right-handed tool and die maker with a broken right arm to answering the phone at full pay rather than send him on sick pay.

The reliance by industry upon women's absence for child bearing as justifying paying them unequal pay was evident during the 18 year struggle of labor to get Congress to enact the Equal Pay Act, 29 U.S.C. § 206 (d). Bills for equal pay were first introduced in Con-

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[11] In the *Stromberg Carlson* case (see p. 3, fn. 1, *supra*) a witness called by the employer, Nurse Mary Lou Sansing, testified that the company rule of requiring women to go on leave at the fifth month of pregnancy was due to men being upset at the sight of a pregnant woman in the factory (Tr. 881). In the *Gilbert* case, General Electric Company's Labor Relations Counsel, Thomas F. Hilbert, Jr., testified that allowing a woman to work after six months presented problems of accidents, efficiency and reluctance of other workers to work with her (Tr. 472-473) but on cross examination admitted that his testimony was based on "my impression of life in the GE Company" (Tr. 532) and could not remember a single report of any such problem having ever reached him (Tr. 533). See Prentice Hall, Personnel Management-Policies and Practices, Report Bull. 25, June 8, 1972, p. 458, reporting on a survey of employers, which stated that "in 35% of responding companies, the policies spell out how long a pregnant employee can continue working. Of those firms, 6 months is the most commonly-mentioned cut-off date, with 7 to 7½ months a close second. Several office firms set an 8-month deadline. A number of plants say 4-5 months."

gress in 1945,[12] reintroduced in 1947,[13] 1962,[14] and 1963,[15] and finally the Equal Pay Act was enacted in 1963. Many representatives of industry supported an amendment proposed by Congressman Findley of Illinois (H.R. 6060, 88th Cong., 109 Cong. Rec. 9217, May 23, 1963), which would have permitted unequal pay for males and females where the differentials were based on "ascertainable added cost" which would arise, said the Congressman, ". . . from the undisputed fact that women are more prone to homemaking and motherhood than men. No one of my acquaintances would want to change this fact, but it is one that enters into personnel costs. It will necessarily be considered by management in establishing wage and salary policies." 109 Congressional Record, House 9205 (May 23, 1963). Industry witnesses referred to maternity benefits as adding to the costs of employing women.[16] Congress rejected this amendment, thus expressing its intent that the employer should bear the costs of maternity benefits without discriminating against its women employees by compensating them on a lower basis than male employees.

It is evident on analysis that the increased cost industry fears is not the cost of the benefits themselves

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[12] S. 779, 1178, 79th Cong.

[13] H.R. 1584, 2483, 81st Cong.

[14] S. 1502, 2494, H.R. 11677, 87th Cong.

[15] S. 1552, H.R. 298, 88th Cong.

[16] Fred Edwards, General Manager of Industrial Relations, Armstrong Cork Co., Lancaster, Pa., Hearings before the Senate Subcomittee on Labor and Public Welfare, 88th Cong. 1st Session on S. 882 and S. 910, April 2, 3 and 16, 1963, p. 148; statement of William Miller for the Chamber of Commerce of the U.S., placed in record April 2, 1963, *id.* 69, 71; statement of W. Boyd Owen, Vice President of Personnel Administration, Owens-Illinois Glass Co. on April 16, 1963, *id.* p. 142; statement of William Miller, *id.*, p. 71.

but of the increased pay for women if their services can no longer be underpaid on the basis of their absences for childbirth. After all the average American woman has not more than two babies [17] and works 22 years.[18] What is the cost to industry of disability pay for two normal pregnancies per 22 years of work life going to amount to? And in California it is paid for by contributions only from workers who through bargaining representatives support the decision below.

I. THE HISTORICAL BACKGROUND AND THE CONTEXT IN WHICH THE CALIFORNIA UNEMPLOYMENT INSURANCE CODE WAS AMENDED TO PROVIDE A TEMPORARY DISABILITY INSURANCE PROGRAM APPLICABLE TO ALL DISABILITIES EXCEPT THOSE PREGNANCY-RELATED AND LATER AMENDED TO COVER COMPLICATIONS OF PREGNANCY, ESTABLISH THAT THE ADOPTION OF THE EXCEPTION CONSTITUTED DELIBERATE DISCRIMINATION AGAINST WOMEN, INCLUDING APPELLEES, BECAUSE OF THEIR SEX.

A review of the history of the coverage of pregnancy-related disability under temporary disability plans and the context in which California adopted the exclusion leaves no doubt but what the exclusion in California reflected a combination of stereotyped con-

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[17] In 1972, the birth rate in the United States was 2.025 babies per couple. See the Scripps-Howard News Service release, "Birth Rate Dip Already Changing U.S. Society," by Ann McFeatters, carried in the Washington Star-News, March 5, 1974, p. A-3, cols. 1-8, middle of page.

[18] The average woman has borne her last child by the age of 30. A woman marrying at age 20 has a worklife expectance of 25 years if she has just one child, 22 years if she has two children, 20 years if she has three children, and 17 years if she has four or more. After losing husbands, widowed, divorced or separated women generally return to the labor force. Such a woman at age 35 can anticipate another 28 years at work. U.S. Dept. of Labor, Women's Bureau Bull. No. 272-1960, Handbook on Women Workers, 1969, pp. 7-8.

cepts of women and the weak political and economic power of women wage earners. The exclusion was based on just such notions as the plurality opinion in *Frontiero* blamed for our statute books becoming "laden with gross stereotypical distinctions between the sexes." *Frontiero* v. *Richardson,* 411 U.S. 677, 685 (1973). The historical background shows the uniform inclusion for almost a century of pregnancy-related disabilities in the social security systems of Europe as an integral part of temporary disability programs, and an initial copying of that pattern in the United States in the first state temporary disability law.

In the years since the California State Disability System, with its pregnancy-related disability exception, was originally adopted, subsequent legislation and administrative rulings have made even clearer that failure to include all disabilities arising from childbirth equally with other disabilities discriminates because of sex.

California is one of the five states which have state temporary disability laws providing for the maintenance of income of employees during periods of temporary disability. Three of these systems expressly include to varying extents pregnancy benefits: Rhode Island (General Laws R.I., § 28-4-8), New Jersey (N.J. Stat. Ann. § 43:21-25) and Hawaii (4 Hawaii Rev. Stat., Title 21, Chapter 392). At the time this suit was begun only California and New York, by statutory language, excluded employees absent from work due to pregnancy-related disabilities from benefits. The New York State Human Rights Commission has ruled that the New York State Human Rights Act, 18 McKinneys Consol. Law of N. Y. Ann., Art. 15, makes

it unlawful for employers to refuse to pay to employees disabled by pregnancy the same disability benefits as are paid for other disabilities. *Armbruster* v. *Crouse-Irving Memorial Hospital,* N.Y.S.D.H.R. Case No. CS-28495-72, decided February 27, 1974. So for all practical purposes all states having temporary disability laws require benefits to be paid for pregnancy-related disabilities excepting only California. It was the exclusionary language in the California statute which the court below held unconstitutional.

Coverage of Pregnancy-Related Disability in Other Countries

Since Bismarck in the last quarter of the 19th century used governmentally administered systems of social security to unify Germany,[19] and European nations promptly copied, income maintenance during nonoccupational illness or injury, including income maintenance during absences from work due to childbirth, dating in Germany from 1883,[20] has become an accepted feature of the social security systems in the industrialized world except the United States.

In contrast to the United States where disability insurance is not yet a generally accepted form of social

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[19] U.S. Senate, 83rd Cong., 1st Sess., Rep. No. 6, Pt. 1, Retirement Policies and the Railroad Retirement System, Report of the Joint Committee on Railroad Retirement Legislation pursuant to S. Con. Res. 51 and 56, p. 18; William Lloyd Mitchell, Social Security in America, U.S. Dept. HEW, Social Security Agency, Bureau of OASI (1962), p. 5.

[20] Grant M. Osborn, Compulsory Disability Insurance in the United States (pub. for S. S. Huebner Foundation for Insurance Education, 1958), pp. 41-42; U.S. Dept. of H.E.W., *Social Security Programs Throughout the World,* 1971 (US GPO 1971), p. 71; William L. Mitchell, *Social Security in the USA,* U.S. GPO 1962, p. 5.

security, disability insurance was the first fundamental form in Europe:

> Sickness disability insurance is a basic form of social insurance in European countries and in many other countries throughout the world; it was one of the first forms of social insurance to receive widespread recognition and adoption. Stemming from the voluntary efforts of workers themselves in a variety of workers' guilds and fraternal orders, sickness insurance became firmly established as part of the social insurance program.[21]

The 1883 German sickness benefits statute did not treat a disability arising out of pregnancy or childbirth any differently from any other sickness except to make mandatory the payment of the usual sickness benefit for a minimum period of at least three weeks following childbirth.[22] For any longer period of disability due to pregnancy the female employee was entitled to the same sickness benefits as any other employee for the same maximum period of 13 weeks.

In 1888 Austria, in incorporating existing sick funds into a national sick insurance system, prescribed a model constitution for a sick fund which provided a maximum of 20 weeks benefits and specified:[23]

> "In cases of normal childbirth, the sick benefit shall be continued for four weeks; if the case con-

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[21] Charles I. Schottland, *The Social Security Program in the United States* (Appleton-Century-Crofts; 2d ed. 1970) p. 149.

[22] Law concerning sickness for workers, June 15, 1883, No. 1496, published in Reichs-Gesetzblatt 1883, No. 9, p. 73.

[23] Henry V. Harris, Workmen's Insurance in Austria, reprinted from the 24th Annual Report of the U.S. Commissioner of Labor, Washington, 1911, pp. 251-253, Art. II, § 3.

tinues longer, then benefits shall be paid up to the maximum above specified" [20 weeks].

Similar legislation was adopted in Sweden in 1891, Denmark 1892, Norway 1909, England 1911, Switzerland 1911, Italy 1912, Netherlands 1913 and Greece 1922. Today 68 countries have such legislation.

The publication, *Social Security Programs Throughout the World, 1971,* U.S. Dept. of Health, Education and Welfare, Research Report No. 40 (U.S. GPO 1971) shows in an elaborate two-page chart for each nation in the world, arranged alphabetically, the various programs for that nation, grouped under the five major groups of social security: in the first row, old age; in the second row, temporary disability; in the third row, injury; in the fourth row, unemployment; and in the fifth row, family assistance. The provision for income maintenance during disabilities due to childbirth is part of the temporary disability program. The introductory pages of the report describe the programs for temporary disability as follows (p. viii):

> One reason for grouping in a single branch the several kinds of benefits shown together in the second row is that each deals in one way or another with the risk of temporary incapacity. Moreover, in the most countries where such benefits are provided, all of them are usually furnished as part of a single system with common financing and administration. The majority of countries provide medical care services for sickness and maternity as an integral part of their sickness insurance system, and link such benefits directly with the provision for cash benefits.

Early Legislative Efforts in the United States

In the United States, during the early 1900's, organized labor attempted to secure state laws requiring employers to insure their employees against loss of income during illness, including loss of income during pregnancy. At the time the successful effort to protect against loss of income by occupational injury resulted in enactment of state workmen's compensation laws, bills were introduced in some 15 state legislatures to provide temporary disability insurance.[24] A committee of the American Medical Association cooperated with American Association for Labor Legislation in drafting a model health insurance act which would have required all insurance companies to provide for their insured members certain specified benefits, including provisions for various maternity benefits, among which was partial income maintenance for females who lost wages because of absences due to pregnancy. Grant M.Osborn, *Compulsory Temporary Disability Insurance in the United States,* op. cit., p. 47. A copy of this model bill is printed in *American Labor Legislation Review, Vol. VI, No. 2,* June 1916, pp. 245-251. The "brief" accompanying this bill stated (*id,* p. 221):

> The payment of a cash benefit equal to two-thirds of wages will enable the wage-earning mother to continue her usual contribution to the normal family expenses for food, rent, heat, and light, even though she is unable to continue industrial employment, either because she is physically incapacitated or because the law, as in several states, compels her to remain away from work for a prescribed period immediately before and after birth

[24] Grant M. Osborn, *Compulsory Temporary Disability Insurance in the United States* (pub. for the S. S. Huebner Foundation For Insurance Education, 1958), p. 47.

of her child. This payment will tend to prevent a lowering of the family standard of living at the time when it is most essential that the mother and baby have all the usual comforts of life.

To the nation as a whole such provision is of greater importance than protection at other times, since the conservation of the life of its future citizens at a most critical period is involved.

The movement in the United States for temporary disability insurance laws during the early 1900's was completely unsuccessful. No state adopted such a law until 1942.

Fringe benefit system in the United States

Employees of major corporations in the United States have been provided, by way of fringe benefits, with all the benfits available under social security in other countries, excepting only income maintenance during periods of disability arising from pregnancy.

The fringe benefit system[25] has been supported by employers and insurance companies in the United States as preferable to governmental social security.[26]

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[25] The fringe benefit system of business and industry as the precipitating factor in the adoption of a statutory system for similar benefits was noted by this Court in *Frontiero* v. *Richardson*. In *Frontiero* this Court (411 U.S. at 679) observed that the paralleling for members of the armed forces was adopted in an effort to attract career personnel on a competitive basis with private business. The message of Governor Warren to the California legislature which preceded its adoption of the temporary disability program indicated that only a small portion of private industry had provided its employees with temporary disability insurance and recommended that the legislature require the extension to all employees. California State Journal, January 23, 1946, p. 28.

[26] Donna Allen, *Fringe Benefits: Wages or Social Obligation?* Cornell Univ., Rev. Ed. 1969, pp. xv, 3-4, 25; Charles I. Schottland, op. cit., p. 150; U.S. Senate, 72d Cong., 1st Sess., Hearings before

In 1925 General Electric Company pioneered with an insurance plan contaning both life insurance and a weekly sickness and accident insurance benefit which paid a scheduled benefit based on rate of wages to employees disabled from work by nonoccupational sickness or injury, excluding pregnant women.[27] The plan was originally non-contributory. When GE expanded the plan and made it contributory, the women employees were not offered participation. Explaining the exclusion of women, then President Gerald Swope stated, "Frankly, our theory had been that women did not recognize the responsibilities of life, for they probably were hoping to get married soon and leave the company."[28] In 1928 the General Motors Corporation adopted a disability plan which included provisions

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[27] Select Committee on Unemployment Insurance pursuant to S. Res. 483 on October 19, 1931, Testimony of Gerard Swope, President of General Electric, p. 28; *Self-Government: Swope Plan to Keep Business Under its Own Control*, Business Week, p. 1, Business Bourse, N.Y., 1931, pp. 22, 60-61.

[28] The General Electric Annual Report for 1928, pp. 16-17 (*Gilbert* record, Plaintiffs Exh. 44A). The failure of the GE plan to cover pregnancy-related disabilities is attacked as sex discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 USC § 2000e, in *Gilbert* v. *General Electric Co.*, U.S.D.C.E.D.Va., Civ. Act. 142-72-R.

[29] David Loth, Swope of GE: *Story of Gerard Swope and General Electric in American Business* (Simon Schuster, New York 1958), p. 155; Gerard Swope, Management Cooperation with Workers for Economic Welfare, *The Annals of the American Academy of Political and Social Science*, vol. 154, pp. 131, 132 (March 1931). The Oral History Section of Columbia University has notes dictated by Gerard Swope which confirm the account appearing in Loth's biography and Swope's speech printed in the Annals. The annual reports of GE continued thereafter to describe the plan as applicable to all men in certain age and service groups but not to all women in the same groups (*e.g.*, General Electric Annual Report for 1928, p. 17.)

for payment of benefits up to six weeks to anyone disabled from work by pregnancy.[29]

Today 64 per cent of the employees in the United States receive as part of their fringe benefit program similar weekly sickness and accident programs except that only 26% are covered for periods of absence due to a pregnancy-related disability and then only for six weeks.[30]

Many of the early plans made no mention of pregnancy. In the first case arising under such a plan in which a woman sought sickness and accident benefits for a period of absence necessitated by normal childbirth, Judge Nathan Cayton, retired Chief Judge of the District of Columbia Court of Appeals, sitting as an arbitrator, upheld the grievance and awarded the sickness and accident benefits. *Washington Publishers Assn.*, 39 LA 159 (1962). The employers argued that

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[29] That the plan, as adopted in 1928, included the same benefits for employees disabled by pregnancy except that the period of payment was limited to six weeks, see Answer of General Motors Corp. to Interrogatory No. 5 on file in *Grogg* v. *General Motors Corp.*, U.S.D.C.S.D.N.Y., Case No. 73 Civ. 63. In that suit it is alleged that this six week limitation on the payment of benefits for disabilities arising from pregnancy, as compared with a 52 weeks limitation on the period during which benefits are payable for other disabilities discriminates because of sex in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 USC § 2000e.

[30] Robert P. Quinn, "Evaluating working conditions in America," *Monthly Labor Review, Vol. 96, No. 11*, p. 32, bot. p. 37 (November 1973). U.S. Dept. of Labor, Bureau of Labor Statistics, Digest of Health Insurance Plans, 1971 ed. (GPO 1972), Vol. 2, devotes a page to the analysis of the insurance provided and whether it includes disabilities arising from pregnancy.

pregnancy is merely a "normal biological function". Judge Cayton stated (at p. 160):

> [T]he contract section neither includes nor excludes maternity conditions. But it is fair to say that the section was written into the contract in order to assure a continuing income for employees unable to work because of physical disability. The section speaks of "sickness benefits" and "absence due to illness" and there is no reason in logic or fairness to hold that there must necessarily be a showing of a disease or malady which was morbid in nature, or which undermined the employee's constitution.
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> We may properly take "judicial notice" that in these times and in this community (as in most others), it is usual—and generally considered imperative—that a pregnant woman is attended by a physician before, during, and after confinement, and that almost all babies are delivered in hospitals. Similarly, there is no need to resort to technical or scientific sources in order to be aware that labor and confinement result in some amount of trauma and debilitation. Such was the situation here, as shown by the physician's report and the testimony of Mrs. N herself. In everyday language, she went to the hospital to have a baby; she was attended by a doctor; leaving the hospital in three days. She went through a process of healing and convalesence; and after an absence of six weeks [3] she was able to go back to work. She had no infection or other complication and it is not claimed that she was gravely ill. On the other hand, what she suffered was clearly much more than a mere trifling or passing indisposition; it was a substantial impairment of her strength and her body

[3] Benefits began after the seventh day of "absence due to illness", and the employer does not contend that the five week claim was excessive.

functions, which made it impossible for her to perform her usual work. It would be unrealistic to hold that she was not entitled to the sickness benefits above described.

For other arbitration awards of sick pay for absences due to childbirth see *Thornapple-Kellogg School District,* 60 LA 549, 561-562, (M. David Keefe, Arbitrator, 1973); *Clio Education Assn.,* 61 LA 37 (James R. McCormick, Arbitrator, 1973).

In other contexts, arbitrators have been holding for two decades that absences of female employees because of a disability arising from childbirth or a complication of pregnancy must be treated as an absence for any physical disability. See *National Lead Co.,* 18 LA 528, 531 (Arthur Lesser, Jr., Arbitrator, 1952) holding that the same rules for leave of absence as are applied for other temporary disabilities must be applied in the case of disability due to childbirth and indicating the arbitrator believes that any other rule would discriminate because of sex; *Republic Steel Corp.,* 37 LA 367 (Joseph Stashower, Arbitrator 1961) holding that continuity of service credit must be granted for a period of leave for childbirth as this came within the clause providing continuity of service was not broken by illness; *American Machine & Foundry Co.,* 38 LA 1085, 1088 (Wayne T. Geissinger, Arbitrator, 1962) where employees absent for illness do not forfeit vacation, women absent on maternity leave are entitled to vacation.

In order to avoid decisions that pregnancy-related disabilities were entitled to the same benefits as other disabilities, employers began to insert an express exclusion in their plans if they desired to exclude such disabilities.

The comparative cost in this country of the sick pay plans as compared with other fringe benefits and as compared with social security is apparent from the following table: [21]

Employee Benefit Costs
1961-1971
(Annual for Employee)

	1971
Social Security	$372
Insurance (non-govt.)	369
Paid sick leave	81
Profit sharing	86
Paid rest periods	280
Workmen's Compensation	82
Paid holidays	244
Private pensions (non-govt.)	402
Paid vacations	400
Other benefits	228
Total employee benefits	$2,544
Average annual earnings	$8,260
Benefits as percentage of earnings	30.8%

Rhode Island temporary disability statute

Rhode Island in 1942 was the first state to adopt a compulsory temporary disability insurance program.[22] The Rhode Island statutory scheme is similar to the California Unemployment Compensation Insurance plan here involved in that the Rhode Island plan was financed entirely by employee contributions of one per cent of wages to a monopolistic state-administered

[21] United States Chamber of Commerce, Biennial Survey, printed BNA, Daily Labor Report 8/10/72 (No. 156), p. A-12.

[22] Rhode Island Pub. L. 1942, Ch. 1200.

fund. The original definition of sickness provided as follows: "An individual shall be deemed sick in any week during which, because of his physical or mental condition, he is unable to perform any service for wages." [33] In 1946 the definition was changed to read: "An individual shall be deemed to be sick in any week in which because of his physical or mental condition, he is unable to perform his regular or customary work." [34]

The Unemployment Compensation Board held that pregnancy came within this definition and was, therefore, compensable under the law.[35]

Elizabeth Duncan Koontz, *Childbirth and Child Rearing Leave: Job-Related Benefits,* New York Law Forum, Vol. 17, No. 2, 1971, pp. 480, 485, describes the experience of the Rhode Island law with pregnancy cases as follows:

> Unfortunately, however, the board did not treat pregnancy like other physical conditions. Eligibility for benefits in cases of pregnancy did *not* depend on actual inability to work as required in the law, but was based upon the existence of the condition of pregnancy. In effect, any time a woman was not working during the entire period of pregnancy, regardless of the reason, she could draw benefits (provided, of course, she met the basic requirements for eligibility).[32]
>
> In addition, the basic requirements for eligibility generally were so loosely drawn that a woman who

[32] U.S. Dept. of Labor, Bur. of Employ. Sec., Rhode Island Disability Insurance Program 41 (July 1954).

[33] Rhode Island Public Laws, Ch. 1200, § 2 (1942).

[34] Rhode Island Public Laws, Ch. 1744, §2 (1946).

[35] Grant M. Osborne, *Compulsory Disability Insurance in the United States* (publ. by S. S. Huebner Foundation for Insurance Education, 1958), p. 115.

voluntarily withdrew from the labor market in January, 1943, after earning fifty dollars a week for the first two weeks of the month, and who became pregnant in January, 1945, could receive benefits of $7.25 a week for 4.6 weeks in January-March 1945, two years after she had withdrawn from the labor market.[35]

[35] Id.

The medical profession in Rhode Island recognized that the original application of the statute to pay benefits throughout pregnancy, irrespective of disability, was unsound. But they condemned as equally unsound the proposed amendment which would have limited benefits payable during a pregnancy—related disability to a shorter period than applicable to other disabilities. In pertinent part the report of the House of Delegates of the Rhode Island Medical Society stated:[36]

> In administering the program, the Board has recognized the condition of pregnancy as a disability compensible under its interpretation of the sickness compensation law. In the initial report from the certifying physician it is required that he attest to pregnancy as a specific disability, whereas he knows that in itself pregnancy is not a sickness or disability and does not necessarily justify absence of the worker from employment throughout the period. It is the conditions arising from pregnancy that justifiably constitute sickness or disability claims which the worker rightfully may make under the law.
>
> The proposal now advanced in the form of an amendment before the General Assembly within

[36] "Medical Amendments to Sickness Act", Report adopted on January 25, 1945, by the House of Delegates of the Rhode Island Medical Society, The Rhode Island Medical Journal, Vol. 28, No. 2, pp. 135, 136, 137 (February 1945).

the past few days does not solve the problem, but rather advances what is an unsound principle both medically and from the point of social insurance.

* * *

We recommend that the law as written be correctly interpreted to understand that sickness or disability arising from, or complications due to, pregnancy be compensible in accordance with the provisions of the sickness compensation act.

Sickness caused by pregnancy should not be distinguished from sickness from other causes, and it should be equally compensible.

California temporary disability statute

California became the next state to adopt a state disability law. In his message to the California legislature submitting the bill, Governor Warren stated:[37]

> The purposes of the program were two-fold: First, to reduce to a minimum involuntary unemployment, the suffering caused thereby, and the resulting decline of purchasing power, and second, to avoid the necessity for resorting to costly relief programs.
>
> Unemployment resulting from illness or disability is a risk faced by all workers. Sickness or injury of a worker when nonoccupational in character and therefore not compensable under the Workman's Compensation Act, deprives the worker and his family of their primary source of income, the pay check, at a time when income is most needed.
>
> When sickness strikes down the breadwinner, living expenses continue just the same, and, in addition, there is often extra expense occasioned by the illness itself.

[37] California State Journal, January 23, 1946, p. 227.

As originally adopted, payments were made for all disabilities except an injury or illness caused by pregnancy prior to termination of the pregnancy and for a period of 28 days thereafter. § 2626. The only other exception was payments to dipsomaniacs, drug addicts and sexual psychopaths who are confined in an institution. § 2678. Benefits are paid for such common conditions as respiratory ailments, heart attacks, and broken bones, disabling mental and physical conditions such as psychiatric disorders, obesity, alcoholism, drug addiction, ailments caused by nicotine consumption, cosmetic surgery, attempted suicide, and even sex change operations. Sex-limited operations or conditions are also compensable, such as circumcisions, prostatectomies and menopause. [38]

The California state disability law is financed entirely by a 1% tax levy on the wages of each employee until a maximum of $85 has been collected each year: §§ 984, 985, 2401. Benefits are paid on a scale graduated in declining ratio to earnings: an employee earning $75 to $524.99 in the highest quarter gets a benefit of $25 a week; an employee earning $1,000 to $1,024.99 in the highest quarter gets $45; an employee earning $2,000 to $2,024.99 gets $85 per week; an employee earning $2,850 or more gets $119 per week. § 2655.

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[38] Various statutory and administrative rules ensure that only those who are truly incapacitated from performing their regular work receive benefits. Claims must be accompanied by a doctor's affidavit attesting to the existence of the disability. Unemployment Insurance Code §§ 2627(d), 2708-2710. The individual must submit to such examinations as may be required by the appellant. Unemployment Insurance Code § 2627(c). Appellant also maintains "yardstick" standards and may further investigate claims of unusual duration. In the absence of hospitalization, benefits are not paid until the eighth day of disability.

Benefits are payable for a maximum of 26 weeks. § 2653. The total amount paid to an employee must not exceed one half of the total wages which the employee received during the base period. § 2653.

Governor Warren in his message stated that the cost estimates made for the program were:

> Based on Rhode Island's actual experience and with allowance for the differences between the Rhode Island law and the law now under consideration for California, the cost in California would be approximately $35,000,000 a year.

The State of California (Appellant Br. p. 11) explains that the Rhode Island experience to which the Governor referred was with respect to costs of the payments which were initially made for pregnancy-related work absences. This indicates that the State of California made a conscious choice between excluding and including payments for pregnancy-related disabilities and chose for reasons of cost to exclude. The whole history of discrimination in employment because of sex is a matter of the employer saving money by paying females less or according them less benefits. Any different treatment of the sexes based on the desire of the employer to save mony is necessaily discrimination because of sex. In War Labor Board decisions which had been issued in the years immediately preceding the enactment by California of the state temporary disability program here involved, employers had repeatedly argued that by reason of absences for childbirth and other reasons it cost more to employ a female so she should be paid less. The War Labor Board uniformly held that this constituted a violation of the governmental policy against discrim-

ination because of sex in respect to equal pay for equal work which was in effect in World War II.[39]

Temporary disability provisions of the Railroad Unemployment Insurance Act

The next temporary disability legislation in point of time and the first federal law providing a temporary disability program was also enacted in 1946, when Congress amended the Railroad Unemployment Insurance Act to provide benefits for periods of absence due to sickness. It defined sickness to include a day of maternity leave.[40]

Prior thereto the Railroad Unemployment Insurance Act had provided benefits only for a day of unemployment due to inability to find work, not a day of unemployment due to being unable to work. The amendment which included the definition of a day of sickness read as follows (60 Stat. 736):

> Sec. 303. The first paragraph of subsection 1(k) is amended by inserting * * * (2) a 'day of sickness' with respect to any employee, means a cal-

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[39] *United Screw and Bolt Co.*, 17 War Labor Reports, 232, 235 (1944); *General Electric Co.*, 28 War Labor Reports, 666, 680, 685-687 (1945). See also pp. 16-17, *supra*.

[40] Railroad Unemployment Insurance Act, 45 USC 351(k)(2), 60 Stat. 736. See Sen. Rep. 1710, 79th Cong., 2nd Sess. reprinted U.S. Cong. & Adm. News 1946, pp. 1316, 1319-1320. The Railroad Unemployment Insurance Act, as amended in 1946 to provide temporary disability pay, gave a pregnant employee not only the same sickness pay for her period of maternity leave, but an additional maternity benefit at the rate of 1½ times the daily benefit rate. 54 Stat. 1494, 1495. This was amended in 1968 to leave her the sick pay during maternity leave but to take away the special maternity benefit. See H.R. 1054, 90th Cong., 2nd Sess. to accompany H.R. 14563, reprinted 1968 U.S. Cong. & Adm. News, p. 1635-1636.

> endar day on which because of any physical, mental, psychological, or nervous injury, illness, sickness, or disease he is not able to work or which is included in a maternity period.

In 1968 the foregoing language was amended and the present formulation enacted. The present definition of sickness appears in 45 USC Section 351(k)(2) and reads as follows:

> A 'day of sickness' with respect to any employee means a calendar day on which because of any physical, mental, psychological, or nervous injury, illness, sickness, or disease he is not able to work, or, with respect to a female employee, a calendar day on which, because of pregnancy, miscarriage, or the birth of a child, (i) she is unable to work or (ii) working would be injurious to her health.

The reports of the Railroad Retirement Board which administers the Railroad Unemployment Insurance Act, showing the number of recipients and amounts paid, according to "major sickness group" and listing "pregnancy, childbirth, and the puerperium" as one type of sickness group are printed regularly in the Railroad Retirement Board Quarterly Review.[41]

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[41] Figures for 1970-1971 appear in Sickness Beneficiaries Under the RUIA, the RRB Quarterly Review, January-March 1972, p. 9, at p. 13; for 1969-1970 in Beneficiaries under the RUIA in 1969-1970. The RRB Quarterly Review, January-March 1971, p. 17 at p. 20; for 1968-1969 in the RRB Quarterly Review January-March 1970, p. 22. The tables all bear a footnote (1) that they include normal periods of pregnancy and the puerperium for which benefits are paid in addition to disabilities from complications and another footnote that the classification by sickness group is in accordance with the World Health Organization, 1955, Manual of

Civil Service Regulations

The United States Civil Service Commission has always required all agencies to provide the same right to use accrued sick leave for absences due to childbirth or any disability arising out of pregnancy as is provided for an absence from any other disability. The statute providing for sick leave neither defines "sick" nor mentions childbirth or pregnancy.[42]

The Civil Service Commission states in its leave regulations that agencies "shall grant sick leave when an employee * * * is incapacitated for the performance of duties by * * * pregnancy and confinement." 5 CFR § 630.401(b). There is no record of any federal agency

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the International Statistical Classification of Diseases, Injuries and Causes of Death. In these years the median age of recipients of benefits on account of pregnancy, childbirth and the puerperium is 25 and average daily benefits are $12.62 to $12.69, as compared with a median age group ranging from 48 to 57 for the other major sickness groups and an average daily benefit of $10.16 to $11.30. The lower benefits in the non-pregnancy cases are explained by the fact that railroad workers who have more seniority have their sickness payments reduced or recovered because of concurrent entitlement to other social security benefits or settlements for personal injury.

[42] The relevant statutory language is (5 USC 6307):

(a) An employee is entitled to sick leave with pay which accrues on the basis of one-half day for each full biweekly pay period;

* * *

(b) Sick leave provided by this section, which is not used by an employee, accumulates for use in succeeding years.

(c) When required by the exigencies of the situation, a maximum of 30 days sick leave with pay may be advanced for serious disability or ailment.

failing or refusing to comply with this mandatory Civil Service regulation.[43]

It is only with respect to the definition of the emergencies which justify an advance of sick leave which has not yet accrued that an apparent divergency of practice exists in the federal government.[44] Some agencies expressly require that the same standard govern in pregnancy-related disabilities as in any other disability.[45]

Recommendations of the Citizens' Advisory Council on the Status of Women

In November 1970 the Citizens' Advisory Council on the Status of Women, operating under Executive Order

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[43] See U.S. Dept. of Labor, Womens Bureau Bulletin No. 272, 1960, *Maternity Benefit Provisions for Employed Women*, pp. 24-25.

[44] The reference in the brief of GE as *amicus*, pp. 13, 43-45, is only to the advance of sick leave, *prior* to its accrual.

[45] The EEOC Personnel Manual, Section 911, as supplemented by Guidelines on Advance Leave issued May 25, 1973, provides:

> Requests for advance of sick leave for reasons of pregnancy and confinement should be treated the same as requests for advance of sick leave in other cases of serious disability regardless of the maternity aspect.

The Department of Transportation, Order entitled Absence and Leave, OST 3600.1, 10-12-72, par. 34, provides:

> Requests for advance of sick leave associated with normal pregnancy and confinement usually should be denied. However, in the event of complications arising from pregnancy or childbirth, the approving official must apply standards of judgment similar to those governing granting of sick leave in other cases of serious disability regardless of the maternity aspect.

No. 11, 126, 3 CFR 971[46] after an extensive study, adopted a Statement of Principles with respect to "Job-Related Maternity Benefits." In pertinent part the Council stated:[47]

> Some employers and some State temporary disability systems treat childbirth as a temporary disability and some consider it a "normal physiological condition." The Council concluded that for purposes of employment it is a temporary disability. Economically it makes no difference whether an employee is unable to work at his regular job because of pregnancy or because of hernia, ulcers or any other illness or accident; in any case he or she suffers loss of pay and has extra medical expenses.
>
> The notion that pregnancy is a "normal physiological condition" has been advanced as a reason for denying women benefits provided for temporary disabilities and occasionally as a reason for providing leaves of absence not provided for other disabilities. Since there are no existing systems or guides for giving leave of absence or insurance benefits for "normal physiological conditions", a variety of policies for this special category result. Some of these create an inequity between benefits because of disability, due to pregnancy and benefits because of all other temporary disabilities. A woman about to give birth is temporarily disabled from work, is under the care of a physician, and is usually hospitalized.

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[46] The Council was established on Nov. 1, 1963, by Exec. Order No. 11, 126, 3 CFR 971 (1964), by President John F. Kennedy on the advice of the President's Commission on the Status of Women, and is composed of twenty private citizens who are appointed by the President for indeterminate terms. U.S. Dept. of Labor, 1969 Handbook on Women Workers, at p. 294.

[47] Citizens Advisory Council on the Status of Women, Women in 1970, at p. 20.

The Council considered whether special benefits for maternity not provided for other temporary disabilities are ever justified. Since women are subject to all the other disabilities of mankind, it can be argued that additional benefits are needed for pregnancy. This line of reasoning treats women as a class and ignores individual differences. The essence of the fair employment concept is individual rather than class treatment.

Individual women who are not pregnant and individual men may be absent more in a given period of time because of temporary disabilities than women who are having babies during that period. The 1961 survey of the Civil Service Commission of sick leave usage by Federal employees shows small differences in the percentages of men and women having zero sick leave balances and negative sick leave balances (those who have been advanced sick leave), indicating that the present system is inadequate for a small percentage of both men and women.

Annual Public Health Service Surveys show that women and men lose about the same amount of time from work because of acute disabilities, including childbirth and complications of pregnancy. In 1968, men averaged 5.2 days per year and women 5.9 days per year; in 1967 it was 5.3 and 5.6 days per year.

Giving special treatment for pregnancy will inevitably lead to situations in which men and other women who are suffering from disabilities other than pregnancy will have less benefits than pregnant women. This is not sociologically or economically justified and would be divisive. In addition, in the United States where the employer frequently pays all or part of the cost of such benefits, such policies could very well result in reluctance to hire women of childbearing age.

Guidelines and decisions under Title VII and state Fair Employment Practice Plans

The Equal Employment Opportunity Commission, herein called EEOC, first by decision [48] and later by its Guidelines on Discrimination Because of Sex, 29 CFR 1604.10(b), effective April 2, 1972, construed the prohibition on discrimination in employment because of sex contained in Title VII of the Civil Rights Act of 1964, 42 USC 2000e, as making it unlawful for an employer to deny to women absent because of childbirth the same temporary disability benefits as are paid for absences due to other disabilities. Section 1604.10(b) of the Guidelines reads:

> Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, and accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

The following states, pursuant to state fair employment practice legislation, have issued guidelines which similarly declare failure to pay to women disabled by pregnancy or childbirth nonoccupational temporary disability benefits on the same terms as are paid for

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[48] EEOC Decision No. 71-1474, CCH—EEOC Dec. ¶ 6221, p. 4282 (March 19, 1971).

other disabilities, to be sex discrimination violating the state FEP legislation:

> Maryland Sex Discrimination Guidelines, Section 8, CCH-EPG Par. 23, 820.08(b), FEP 451:544;
>
> New York State Division of Human Rights, Employment Policies Relating to Pregnancy and Childbirth, Section 15-C(3), CCH-EPG Par. 26,059;
>
> Washington Sex Discrimination Guidelines, WAC 162-30-020(6), FEP 451:1248(a); CCH-EPG Par. 28,574(6);
>
> Wisconsin Sex Discrimination Guidelines, adopted July 10, 1972, FEP 451:1282(a)(B).

To date there have been two federal district court decisions in cases arising under Title VII which have upheld the above-quoted EEOC guidelines and ruled that an employer discriminated because of sex in violation of Title VII by failing to pay sickness and accident benefits to women disabled by normal childbirth. *Wetzel* v. *Liberty Mutual Insurance Co.*, 7 FEP Cases 34, 271 (U.S.D.C.W.D.Pa. 1974); *Dessenberg* v. *American Metal Forming Co.*, U.S.D.C.N.DOh.E.D., Civil Action No. C-72-48T, decided by Judge William J. Young on October 3, 1973. And an arbitration award holding that the six-weeks limitation on disability benefits for pregnancy-related disabilities under a plan which otherwise had a 52 week maximum violated Title VII, was enforced by a state court *Goodyear, Tire and Rubber Co.* v. *Local Union No. 200, United Rubber, Cork, Linoleum and Plastic Workers of America*, 6 FEP Cases 1069 Court of Common Pleas of Auglaize County, Ohio, Case No. 73-74).

There is one federal district court decision which contains an ambiguous ruling relating to this issue

The ambiguity arises from the fact that it is not clear from the court's opinion whether the plaintiff limited her claim to benefits to a period she was disabled or whether she claimed the right to benefits throughout pregnancy without regard to whether or not she was disabled. Thus the court in *Newmon* v. *Delta Airlines,* 7 FEP Cases 26 (U.S.D.C.N.D.Ga. 1974) stated, at p. 32:

> [T]here is no judicial determination that the regulations, particularly 29 CFR § 1604.10(b), mean pregnancy is a sickness or disability and therefore entitles pregnant women to such benefits as a matter of law as the plaintiff implies. * * * Furthermore, upon examining the actual wording of the guidelines it is not apparent that they actually equate pregnancy with disability or sickness.

The New York State Division of Human Rights has likewise issued a decision ordering payment of non-occupational sickness and accident benefits for pregnancy-related disabilities where such benefits were paid for a wide range of other disabilities. The case arose under the sex discrimination provisions of state F.E.P. legislation. *Armbruster* v. *Crouse-Irving Memorial Hospital,* NYSDHR, Case No. CS-28495-72, decided February 27, 1974.[49]

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[49] The argument in the Brief of GE as *amicus* (pp. 50-51, fn. 49) based on the interpretation during the period 1950-1964 by State Fair Employment Commissions of state statutes as not making exclusion of pregnancy from temporary disability benefits unlawful rests on the erroneous assumption that during this period state fair employment practice acts forbade sex discrimination. Prior to February 8, 1964, when Congressman Smith offered the amendment which put the word "sex" in Title VII (110 Cong. Rec. 2577, Col. 1, 2584, Col. 3), Hawaii was the only state which included a prohibition of sex discrimination in its state fair employment practice act. The Hawaii Act was first approved June 3, 1963, and did not become effective until January 1, 1964. Hawaii L. 1963, Act 180, Sec. 1(b), (c) and (d).

With respect to GE's contention (Br. *amicus* pp. 11-12, 38-43) that Section 1604.10 of the EEOC's Sex Discrimination Guidelines is not consistent with earlier agency positions, we believe there are three answers: (1) EEOC had never prior to the issuance of Section 1604.10 issued any guidelines on this subject and had issued no clear statement on the subject; (2) the statement that pregnancy is unique and not to be equated with other illnesses which was attributed to EEOC by the various commercial reporting agencies occurred in the context of a discharge of an employee because of pregnancy and the EEOC ruled that she had to be given leave whether or not leave was provided for any other illness, rather than in the context of an issue over sick pay;[50] and (3) there is no basis in any

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[50] See for example EEOC Decision No. 70-360, CCH-EEOC Decisions ¶ 6084 (December 16, 1970), where the charging party claimed that the employer discriminated against her because of race in refusing her maternity leave thus treating her as a quit when she was absent because of childbirth. The employer refuted the race discrimination charge by showing he had likewise denied maternity leave to Caucasion employees. The finding that the employer violated Title VII, quoted the disputed November 15, 1966 opinion letter as follows: "The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex . . . Accordingly, we believe that to provide substantial equality of employment opportunity . . . there must be some special recognition for absences due to pregnancy, . . . for this reason, . . . a leave of absence should be granted for pregnancy whether or not it is granted for illness." The issue of sick pay was not involved, but solely the right to return to work following absence for childbirth. The EEOC's position that even though males are never given such sick leave, as a man may lead the full life of a male and never miss work because of sickness, the absence of leave for disability has a disparate effect on females as they cannot lead the full life of a female without missing work because of childbirth.

opinion letter, decision or other statement of EEOC position for assuming that if it had considered sick-pay policies applicable to all disabilities except pregnancy-related it would have held non-discriminatory the denial of benefits for pregnancy-related disabilities.

GE (*amicus* Br. p. 40) quotes two paragraphs which GE describes as setting forth the position of the EEOC in 1966 as it "appeared in a series of opinion letters issued by the EEOC's General Counsel in 1966" (*id,* pp. 39-40; see also p. 12). GE (*amicus* Br. pp. 40-41) states that there is no contradiction of the testimony that "quoted statements from the 1966 letters reflected official EEOC policy during his incumbency as General Counsel" (GE, *amicus* Br. pp. 40-41). Portions of the testimony of Charles Duncan, former General Counsel of EEOC, are set forth in the Appendix, pp. A-1 to A-7 at the end of the brief of GE as *amicus.* Defendant's Ex. 12, to which reference is made in the GE's Appendix, pp. A-2 and A-3, and which is quoted at GE (Br. *amicus* p. 40) consists of unsigned copies of two letters dated respectively November 12 and November 15, 1966 (Defendant's Exhs. 12A and 12B). As appears at Appendix to GE's brief *amicus* p. A-2, Charles Duncan ceased to be General Counsel of EEOC in October 1966. He testified on cross examination that he did not remember signing either the opinion letter dated November 15, 1966, letter quoted by GE (Br. *amicus,* at p. 40, lines 5-13) (*Gilbert* Tr. 568-569) or the November 12, 1966 letter quoted by GE (Br. *amicus,* at p. 40, lines 17-20) (Gilbert Tr. 568-569) and that on the dates November 12, 1966 and November 15, 1966 (*Gilbert* record Def. Exh. 12B) he had ceased to be General Counsel of the EEOC. He stated he did not know if anyone ever signed either letter (*Gilbert*

Tr. 553-554, 571), did not know to what company, if any, either letter was addressed (*Gilbert* Tr. 569), and did not know whether either letter was ever received by any company (*Gilbert* Tr. 569, 571).

When GE has been unable to locate any documentation except carbon copies of letters which were never signed nor sent by their purported author, there can be no basis for finding that EEOC did issue any earlier conflicting rulings. In the November 15, 1966, draft of a letter which was never identified as in fact sent to anyone, the EEOC recited the various exclusions from disability pay so that the exclusion for pregnancy did not in that plan constitute the only exception as is true here.

Finally, of course, this Court dealing in this case with the equal protection clause, has no concern with the validity of the Guidelines except as they demonstrate that the primary agency in which Congress has vested power to correct discrimination because of sex in employment considers that equal treatment requires that pregnancy-related disabilities be treated exactly the same as other disabilities.

II. THE CALIFORNIA STATUTORY PROVISIONS, BY EXCLUDING FROM TEMPORARY DISABILITY BENEFITS FEMALE EMPLOYEES WHOSE INABILITY TO WORK IS DUE TO CHILDBIRTH OR RECOVERY THEREFROM, WHEN SUCH BENEFITS ARE PAID TO MALE EMPLOYEES WHENEVER THEY ARE DISABLED FROM WORK, IRRESPECTIVE OF THE CAUSE, PER SE DISCRIMINATE AGAINST FEMALE EMPLOYEES BECAUSE OF THEIR SEX.

A. The State of a Female While in Labor and Delivery, Even When the Birth Is Entirely Routine and Planned, Is an Illness or Sickness.

Appellant now concedes that the California statute makes benefits available for all disabilities caused by any complication of pregnancy, both as a result of the construction placed on the statute by the California state courts (*Rentzer* v. *California Unemployment Ins. Appeals Board,* 32 Calif. App. 3d 604), and of the amendment effective January 1, 1974 (Appellants Br. p. 7). By definition this leaves, as the only exclusion, women whose period of disability is the time they are in the three processes of childbirth known as labor, delivery and puerperium. It is irrational to exclude childbirth from the category of disabling sicknesses for which sick pay should be paid.

While modern medicine through its use of anesthesia and elaborate new electronic fetal monitoring systems [51]

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[51] For a description written for the lay reader of FMS, as it is known in the medical profession, see *Confessions of a Gynecologist* by Anonymous M.D., Doubleday & Co., 1974, pp. 75-76: "Today's obstetrician is more like an airliner pilot, who still needs his flying skill but has an array of electronic helpers. The pilot has radar to 'see' through darkness and fog; I have available the fetal monitoring systems which continuously record vital conditions in the womb. The baby is connected to a cardiometer by a thin, sterile wire, introduced through the vagina and cervix and harmlessly clipped to the fetal scalp. The impulses of the heart show up visually on a screen and, at the press of a button, can be recorded on a continuous strip of paper—a record of exactly what is happen-

may have camouflaged the historic drama of childbirth, it would be ironic to say that the planned delivery of the medical profession robs childbirth of its character as sickness. Consider childbirth without the miracles of modern medicine. Recall Rudyard Kipling's line, "She who faces death by torture, for each life beneath her breast",[52] or our own Pearl Buck, whose third chapter in the *Good Earth* comes to mind when we think of childbirth in literature. We read how the Chinese wife worked beside her husband until labor began and then got his meal for him before giving birth. Pearl Buck expressed her view of childbirth in these words:

> [W]hen she has a child she goes down into a simple elemental experience * * * which divides that self into another and brings all of life into its simplest primeval terms. * * * Women are cleansed in soul by this return to the elements of death and life that make childbirth * * *.

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ing. At the same time, a fluid-filled tube running from the uterus to the monitor measures and records the frequency, duration, and pressure of each contraction of labor.

"The FMS, as we call it, enables the obstetrician to make tough medical decisions more quickly and with greater assurance. I wasn't exactly flying blind before the FMS, but at times the signs might not be clear. For example, I might be hard put to decide whether a difficult labor should be allowed to continue or whether the child should be delivered by Caesarean section. Much new evidence has accumulated indicating that there comes a point in a prolonged labor, even though seemingly normal, when the child may be damaged: The fetal heart action is depressed during hard labor contractions and this, in turn, reduces the supply of oxygen reaching the infant's brain. If this hard-squeezed distress persists too long the child may be compromised. In some cases the baby may seem quite normal when born, but later may lag in its development and show evidence of mental retardation. On the other hand, a Caesarean is not to be undertaken lightly because, like any major operation, it carries a certain amount of risk, additional pain, a longer hospital stay, and considerable expense."

[52] The Female of the Species, *Rudyard Kipling's Verse*, Doubleday 1940, pp. 364, 365.

> The risk of death in childbirth exalts the woman. She goes down to the gates of death and she comes back triumphant over death.[53]

Isadora Duncan describes her experience wth childbirth as follows:[54]

> Talk about the Spanish Inquisition! No woman who has borne a child would have to fear it. It must have been a mild sport in comparison. Relentless, cruel, knowing no release, no pity, this terrible, unseen genie had me in its grip, and was, in continued spasms, tearing my bones and my sinews apart. They say such suffering is soon forgotten. All I have to reply is that I have only to shut my eyes and I hear again my shrieks and groans as they were then.

Then there is the death of Princess Elizabeth in childbirth in Tolstoy's War and Peace.[55]

That childbirth is still a leading cause of death for American women of child bearing age see Warren M. Hern, M.D., "Is Pregnancy Really Normal?" 3 Family Planning Perspectives, January 1971, pp. 5-8. See the testimony of Dr. Donovan quoted, p. 62, *infra*. Nor is it only the mother who risks death. In 1968 the infant mortality rate in the United States was 21 for 1,000 births.[56]

We anticipate this will elicit a response from opposing counsel that all this shows what a different world we get into when we enter upon the subject of pregnancy and childbirth. But it is a subject that is in the plants today. Employers brought it there by hiring some 33,000,000 women who constitute 38.5 per

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[53] Pearl S. Buck, *Of Men and Women*, John Day, 1941, p. 153.

[54] Isadora Duncan, *My Life*, Boni & Liveright, N.Y., 1927, pp. 194-195.

[55] Leo Tolstoy, *War and Peace, Book IV*, Chapters VII and IX, (1869).

[56] *United Nations Demographic Yearbook 1970*, Table 16, p. 646.

cent of all workers.[57] Our gross national product now requires the continued presence of these women in industry. Industry has forced women into the work place by paying males such low rates of pay, it today takes two paychecks to meet the family budget.[58]

The appellant (Br. p. 31, fn. 48) and GE as *amicus* (Br. pp. 7, 18) quote testimony from the *Gilbert* case for the proposition that neither medical assistance nor hospitalization is essential in childbirth. In quoting Dr. Hellegers[59] to the effect that "labor" in itself

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[57] U.S. Dept. of Labor, "Women in the Labor Force," 1972.

[58] In 1950 according to U.S. Bureau of Census, median earnings of men who headed families, were $3,435, while the BLS Budget for a city worker's family of four was $3,718 in October 1950. By 1970, the budget had risen to $10,646 whereas the median gross earnings of a worker were $6,228 a year. For California workers see fn. 82, p. 93, *infra*. On March 17, 1969 BLS instituted a new system of issuing its periodical cost-of-living figures so that henceforth three budgets will be issued, a lower budget, a moderate budget, and a higher budget. The moderate level budget is a continuance of the prior budget. See BLS Bull. No. 1570-5, *"Three Standards of Living for an Urban Family of Four Persons"* (Spring 1967). It may be that history will record the TV advertising campaigns which built into American workers' minds the necessity for a higher standard of living, at the same time that their wages did not keep pace as the force which drove women out of the home and into the factory.

[59] The medical experts to whose testimony we will here refer are the same ones whose biographical sketches and testimony appeared either in the record in *Cleveland Board of Education* v. *LaFleur*, Nos. 72-777, 72-1129 or the Appendix to the Brief of the International Union of Electrical, Radio and Machine Workers, AFL-CIO, as *amicus curiae* in that case. They are: Dr. David Forrest, who was the personal obstetrician of the plaintiff, Susan Cohen, in the case of *Cohen* v. *Chesterfield County School Board*, No. 72-1129, who also testified as an expert witness called by the plaintiffs in the *Gilbert* v. *GE*, U.S.D.C.E.D.Va., Richmond Division, C.A. No. 142-72-R case on July 24, 1973 and whose testimony

does not require medical assistance and all the doctor does in "labor" is to hold hands and rub backs and encourage, (Appellant Br. p. 31, fn. 48) appellant overlooks the distinction between the process known as labor which precedes delivery and the delivery itself. Dr. Hellegers described the function of the doctor in delivery as the performance of an episiotomy (Gilbert Tr. 329-331) which he said was routine procedure in the United States (*Gilbert* Tr. 330-331). He explained that the doctor also is necessary for the purpose of suturing the episiotomy or other tears (*Gilbert* Tr. 330-331).

In addition, the brief of GE as *amicus* (pp. 7, 18), argues that the "common" use of "home deliveries by trained midwives" in Europe demonstrates that medical assistance during delivery is not required. Dr. Hellegers testified in the *Gilbert* case that it was his belief that delivery by "lay people" in Britain, Holland and Western Europe is less common than in the United States (*Gilbert* Tr. p. 324) and that in Holland, for instance, midwives have "more obstetrical training than 90 per cent of the American medical profession" (*Gilbert* Tr. 327). In Holland midwives have first of all a nursing degree and then attend one of the Royal

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therein will be here cited, *Gilbert* Tr. ——; Dr. George Wilbanks, Chairman, Dept. Ob-Gyn, Rush Medical College, Chicago, whose deposition as a witness for GE was taken in the *Gilbert* case on April 12, 1973; Dr. Andre Hellegers, Prof. of Ob-Gyn, Georgetown Univ., who testified as an expert witness for the plaintiffs in the *Gilbert* case on July 25, 1973 and in *Avery* v. *General Railway Signal Corp.*, N.Y. State Division of Human Rights, Complaint Case Nos. CS-27503-72, etc., cited *Gen. Ry.* Tr. ——; and *Franklin* v. *Stromberg-Carlson Corp.*, Case Nos. CS-27069-72, etc. in Rochester, New York on June 8, 1973, cited *Stromberg* Tr. ——; Dr. John C. Donovan, Chairman of Obstetrics-Gynecology, University of Rochester Schoof of Medicine, who testified for the employer in *General Railway Signal* and *Stromberg-Carlson*.

Schools of Midwifery for two to three years. "If you are delivered by a midwife in Holland, you have a much better obstetrician than if you are delivered by a regular M.D., American surgeon" (*Gilbert* Tr. 327). Delivery in the home in Europe is occurring less and less. Dr. Hellegers testified on cross examination by counsel for GE (*Gilbert* Tr. 325):

> A. I think the last bastion of home delivery is my own place, I came from Holland, and that has changed from 70 per cent home to 70 per cent hospital in the past 15 years.
>
> * * *
>
> Q. The figures on complications and death and so forth compared favorably with comparable figures in this country, did they not?
>
> A. I would say their figures have always been better than in this country.

On redirect he testified (*Gilbert* Tr. 326):

> Q. Would you suggest why the figures were better than the United States during the period?
>
> A. Oh, yes, for a very simple reason. If you develop a complication at home in Holland they can get you to a hospital faster than, you know, in the United States.
>
> As a matter of fact I used to live across the border in Belgium and deliver babies in Holland. And it took me less time, and my patient less time, to get from my home in Belgium to the hospital and to the delivery room than it took me to get from the intern quarters to the delivery room at Johns Hopkins. I mean there is a hospital every three miles and no city congestion.
>
> But I wouldn't like to try it in Rotterdam or Central Rotterdam. That is where one no longer delivers at home. So it is a question of access to emergency facilities which are infinitely better in Europe than they are here.

Dr. George Wilbanks as an expert witness called by GE in the *Gilbert* case testified (*Gilbert* Tr. 582):

> Now I might say that in England they have what is called a "flying squad", wherein women are delivered in the home by midwives and if something goes wrong, a doctor with blood, instruments and an operating table are in the ambulance and they are rushed to the home so that the patient can be taken care of.

The assertion in the brief of GE as *amicus* (pp. 7, 18, fn. 9) that the "reason" for the trend towards hospitalization for delivery in the United States is in part "to assist in helping with child nursing and to provide for the infant's psychological support" ignores the routine performance of the surgical procedure of episiotomy in all deliveries, which entails anesthesia, suturing and all of the other usual features of surgery which can only be performed in a hospital (see pp. 61-64, *infra*). The testimony of medical experts that only ½ per cent of pregnant women have complications which require hospitalization, to which GE in its amicus brief refers (pp. 7, 19), made very clear that the experts were referring only to hospitalization because of a complication during pregnancy and prior to the hospitalization for labor and delivery which is regarded by the medical profession in the United States as absolutely essential in all cases. Every medical expert to testify in the *Gilbert* case so testified. Dr. Forrest testified that 100 per cent of normal pregnancies go to the hospital when they deliver; even if they are delivered by a rescue squad they still go to the hospital and to the delivery table (*Gilbert* Tr. 88). To the same effect, see Dr. George Wilbanks, GE's expert witness (*Gilbert* Tr. 581-582) and Dr. Hellegers (*Gilbert* Tr. 325).

1. The terms used in the California statute, "illness or injury" are lay terms

The appellant (Br. pp. 8, 11-12, 17) argues that women who suffer no complication of pregnancy but are disabled only by a normal childbirth are properly placed in a class apart from those covered because the purpose of the statute (Section 2601) and its definition of disability or disabled (Section 2626) establish the class as defined by the words "illness" or "injury".

Neither the word illness nor injury is a technical medical term. Dr. Wilbanks, called as an expert witness for GE in *Gilbert* v. *G.E.* testified (*Gilbert* Tr. p. 577):

> Q. What do the terms "sickness" and "illness" mean, medically speaking?
>
> A. I think, medically, it would be similar to "disease." I think I would prefer that "disease" would be the medical term and "illness" and "sickness' would be more lay terms for a similar condition.
>
> Q. Are the terms "disease", "sickness" and "illness" synonymous from a medical point of view?
>
> A. Yes, I think, in general, they would be, although there are some innuendos of illness and sickness. Some lay people use these terms meaning nausea and maybe just a feeling of poor feeling, where I think "disease" as used by the medical person, would be critically defined as a definite condition.

Similarly, Dr. Hellegers testified (*Gilbert* Tr. 243):

> Q. Is sickness a medical term?
>
> A. Well, sickness, I think, is much more of a lay term. It is a word used much more by the laity in terms of the way they feel like illness and sickness.
>
> Disease would be much more the medical or technological term for the conditions that a patient might have.

Explaining, Dr. Hellegers testified (*Gilbert* Tr. 289-290):

A. Well, illness and sickness, I think I have said throughout is something that the patient perceives, so, as you know, a patient may still feel sick in the absence of a disease even—

Q. Yes.

A. I think I said I tend to think of the words, "I feel ill" and "I feel sick", as being perceptions of the person, whereas a disease is something that is diagnosable by a physician as being abnormal.

THE COURT: You mean is subjective and one is objective?

THE WITNESS: That is precisely right. I would use the word, Your Honor, of disease being objectively noticeable and illness and sickness as subjectively a perception of the individual.

Dr. Forrest emphasized the discomfort of the patient in his definition of the word disease (*Gilbert* Tr. 13-14):

A. In my own mind I like to break the word "disease" down to the "dis" and the "ease". And the prefix, "dis", meaning to reverse, and I think of it in terms of the patient's, the individual being in a comfortable state, is suddenly conscious of certain stresses that have been placed on the body mechanism and he now becomes diseased or uncomfortable, sufficient to seek out or ask for medical attention.

Having regard to this definition, all women who deliver would be diseased. In this regard, Dr. Forrest testified (*Gilbert* Tr. 89):

Q. So when you said 90 to 95 per cent of the pregnant women suffer no disease, you did not go back to your definition of disease, did you?

A. No. If I relate to discomfort aside from the normal state of wellbeing I probably did not relate that.

Q. 100 per cent of them have suffered discomfort, did they not?

* * *

THE WITNESS: If you are referring to the fact that they required anesthetic for the time of the delivery to relieve the pain and discomfort, the actual delivery process and the episiotomy, or they required medication and/or anesthetic during their labor, then the answer would be yes.

As with all systems of classification, the function to be served by the classification results in a definition useful for one purpose but irrelevant for others. Dr. Andre Hellegers testified in the *Stromberg* case (Tr. 144):

Q. How do you define disease?

A. Well, there have been several major definitions. One would be a statistical deviation from what is normal.

A second set of definitions would say that a diseased state is a state in which one cannot function. And a third definition would say that it is a state which if not corrected would lead to further complications and possibly ultimately death.

And he elaborated further in his testimony in the *Gilbert* case (Tr. 242-243):

A. We need a whole set of approaches to the definition, and I don't know which of these to define by myself. Some people would define disease or abnormalcy as a statistical deviation from an average.

Under that kind of definition, for instance, hypertension might be a disease, hypotension would be a disease; but it is a vague definition because it presumes something like normal tension, and so when you statistically deviate either towards the low or high side from that number then you might say that is abnormal, that is a disease.

A second approach would be to try to define disease in terms of ability to function. To show some of the handicaps of going that route it might mean that somebody who had, say, a Jewish nose in Nazi Germany and was consequently unable to function

in Nazi Germany would have a diseased nose. That leads to certain, you know, ridiculous lengths, but there are people who talk about ability to function. A third kind of definition would have it that disease is that which, if not corrected, would continue leading to further debility and ultimately to death. I suppose that is the commonest definition.

A fourth and more modern type of definition has come through the World Health Organization's definition of health which says that it is not just an absence of disease but the presence of a total sense of physical, psychological, and social well-being. So that conversely, you might then define disease as the absence of a sense of total physical, psychological or social wellbeing.

The World Health Organization, Manual of the International Statistical Classification of Disease, Injuries and Causes of Death, 1955 rev. ed. classifies normal delivery as a disease assigned the digit 600. See brief of AFL-CIO, as *amicus curiae,* p. 10. See also fn. 41, pp. 36-37, *supra.*

2. The normal character of the delivery affords no rational basis for exclusion from benefits

The attempt by the State of California to draw a line between the normal and the abnormal in pregnancies and to deny benefits in the normal but not the abnormal is irrational. As we shall show (pp. 61-64, *infra*) it is routine medical practice to perform an episiotomy in every delivery in the United States. Is an episiotomy normal? California regards delivery by Caesarian section as abnormal and hence entitling the pregnant employee to benefits. When two women go to the delivery room and one doctor decides to perform a Caesarian and the other performs an episiotomy, is there any rational basis for paying benefits to the one rather than the other? The word normal does not

serve to define disease. See Dr. Edmund A. Murphy, "A Scientific Viewpoint of Normalcy" *Perspectives on Biology and Medicine, Vol. IX, No. 3,* Spring 1966, p. 333, quoted in brief of AFL-CIO as *amicus* at pp. 13-15. Dr Murphy, pp. 333-334, 346-357, states:

> To anyone considering the subject for the first time, it is a matter of some astonishment that so much is written about the normal, so little about normalcy. The former relates to the practical guidelines which the medical practitioner may use, the latter to the kind of "abstractions" with which the theologian, the philosopher, the educator, the politician, or the lawyer would like to deal.
>
> * * * All too often the ill-considered pronouncements of a "medical expert" are borrowed for use in such areas as education and politics and his most casual comments can provide substrate for generations of speculative philosophy.
>
> The medical specialist most likely to come to grips with the problem is the academic pathologist. It is strange that the physiologist and the anatomist whose declared area of expertise is the normal never seem to consider the problem at all—whether through inadvertence or through a feeling that the question is trivial, is not clear.
>
> * * * We may accept as normal anything which discharges its proper function. This is at best a slight improvement. It is possible for an organism to function very well as a whole in the face of grave abnormalities, for example blindness. Overcompensation by other mechanisms may make good most or all of the deficiency. Yet we cannot be content to say blindness may well fall within the range of the normal. The other defect in the approach is that it leaves undefined the normal function of an organ, and if we think of it as determined by the environment and subject to ruthless selection, we are again faced with all the problems of the polarity of evolution. Beyond this the scientist cannot go.

> * * * If the philosopher can decide, in useful working terms, not in abstractions, how the normal is to be identified, then the methods of science and the refinements of statistical analysis may help to crystallize definitions in a form appropriate for general use. "Normal" may be used in other senses by experts in other fields, and if they wish to enlist the help of science, then it is appropriate that each of them should provide his own definition.

Dr. Hellegers in his testimony, emphasized that the meaning of disease depends entirely on the purpose for which the definition is used (*Stromberg* Tr. 144, supra). Under cross examination by employer counsel, Dr. Hellegers referred to Dr. Murphy's article (*Gen Ry.* Tr. at pp. 224-229):

> Q. Now then is there a medical reason for distinguishing between paying for a person who is absent from work because of sickness, illness or disease and a person who is absent from work because of a pregnancy?
>
> * * *
>
> A. Well, I suppose that paying somebody money because they are diseased is something that one does for a purpose and I don't know what the purpose is, industry would have to tell me. I guess to pay their doctor's bills or something of this order.
>
> Q. Would you agree, doctor, that there is a difference in the underlying—medically there is a difference in the underlying reason for the absence, one being caused by a medically recognized disease, sickness or illness?
>
> A. Yes.
>
> Q. And the other being caused by a medically recognized normal physiological function?

A. Well, I don't see why in the normal state one should be paid for being absent. I don't medically see what the reason would be for being paid for being absent when one is normal.

MR. CARNEGIE [Hearing Examiner]: Let him finish.

A. I would think that if one were in both cases debilitated in one way or another and couldn't perform I would see there might be a reason for paying both in terms of the handicap or the hope they would come back to work as soon as possible in the non-debilitated state.

* * *

Q. Now I'm going to paraphrase it. It's the best I can do at the moment. It had to do with whether there was any medical reason for making a distinction between giving a person money who was absent because of a childbirth or pregnancy reason and a person who was absent for or because of a disease, sickness or illness?

A. My answer to that is no, there is no difference provided in both cases debilitation is present.

Q. By debilitation what do you mean?

A. Inability to work.

* * *

A. If I start off with a normal person not pregnant and a normal person pregnant and both of them develop debilitating conditions I see no reason to treat them differently.

Q. Would you decipher the terms as you're using it, debilitating?

A. Unable to perform the tasks that they are supposed to perform.

A. That was, incidentally, one of the definitions I gave of disease I think earlier on. I gave one as deviation from the statistical norms. I gave one as a condition which if not treated would inevitably lead to degeneration and death and all three definitions have been argued notably by a man

named E. J. Murphy in "Prospectives in Biology and Medicine" in a Spring issue of 1966. He is a physician, geneticist and statistician who was trying to arrive at how do we come at a definition of health and disease.

Dr. Hellegers further elaborated on these definitions in his testimony in the *Gilbert* case (Tr. 242-243, p. , supra.

Virtually every birth in the United States involves the surgical procedure of an episiotomy, a cutting of the tissue between the posterior opening of the vagina and the rectum to provide an opening large enough for the baby's head to pass through. Dr. John A. Donovan, Chairman of the Department of Obstetrics and Gynecology, Strong Memorial Hospital, Rochester, New York, testifying as an employer witness in *Franklin* v. *Stromberg-Carlson* on April 18, 1970 before the New York State Division of Human Rights, Complaint Case No. CS-27069-72, pp. 139-142, testified:

> Q. Can you explain why an episiotomy would be normal on term size babies?
>
> A. In the normal physiologic situation this is one place where nature fails. The skin, the tissues surrounding the opening to the birth canal is seldom able to dilate enough to permit a baby to come through without the woman sustaining a tear which in the normal course of events heals, but a clean surgical incision is generally thought of as preferable to a tear.
>
> Q. An episiotomy is a surgical procedure, is that correct?
>
> A. Yes, it is cutting.
>
> * * *
>
> Q. This involves some sort of a suture after the surgical cut is made?
>
> A. Right.

Q. What kind of a suture? You use the same type of suture you use in other operations?
A. Generally cat gut.
Q. Do you use that in other operations too?
A. Yes.
Q. This involves some form of anesthesia, does it?

* * *

A. The average practice in Rochester, I think certainly the average practice at Strong Memorial would be to use a local anesthetic.

* * *

Q. Historically did the tearing itself cause hemorrhaging on occasion?
A. On occasion.

Anesthesia for delivery often presents the problems for the anesthetist that are common in the use of anesthesia when a patient arrives in the hospital as a result of injuries in an accident. There is no time to prepare the patient. She may have eaten a hearty meal within the hour. Asphixiation by aspiration of her gastric contents is therefore one of the commonest causes of maternal death. (*Stromberg Carlson* Tr. 143). Dr. Donovan testified (*id.*):

Q. Would you indicate the type of situations that give rise to fatality in delivery itself?
A. Yes, aspiration of the gastric content, vomiting and then aspiration, swallowing the wrong way down the lung, sometimes unwise anesthesia, anesthesia that would be necessary, that would be one example.

Again at *Stromberg-Carlson* Tr. 148-150, Dr. Donovan testified:

Of course, as I previously indicated, I think that labor is disabling and part of the disability of the

labor has to do with the tissue trauma of delivery and the stretching that goes on which many times is more traumatic than is the episiotomy. Indeed, that's the purpose of the episiotomy, to cut down the natural trauma connected with this admittedly disabling phenomenon.

Q. Does the tearing of the tissue ever arise to the level that you regard it as a disease?

A. Yes.

Dr. Forrest described an episiotomy as follows (*Gilbert* Tr. 29):

> An episiotomy is that incision which is made between the posterior opening of the vagina and the rectum. And this incision releases the muscular—muscles and fibers, tissue, and allows a larger opening so that when the baby's head is delivered there is— it makes it easier for the baby's head to be delivered.
>
> * * *
>
> In most instances, particularly with the first baby, if you don't make it nature will make it for you and a tear is much harder to repair than an incision.

The consequences which might ensue if instead of an episiotomy a woman had a tear which was not repaired, were described by Dr. Hellegers as follows (*Gilbert* Tr. 332):

> the most severe form might be a formation of a fissure which would be an opening or tract between the vagina and the peritoneal, and a lesser—a relaxation of the perineum, possibly loss of control of the sphincter, control in the rectum, or worse—well, not worse but alternatively, uneven healing of the two edges of the wound so that one is constantly sitting on a knob with the pain and discomfort of constantly sitting on a knob.

Both Dr. Forrest (*Gilbert* Tr. 29-32, 77-79, 89) and Dr. Hellegers (*Gilbert* Tr. 329-332) testified that an episiotomy was routine in all deliveries in the United States.

Whether or not the opening is caused by a surgical incision or a natural tear, it must be repaired, and is done so with absorbable sutures under anesthesia. The sutures and anesthesia are the same kinds that are used in other surgical procedures on both men and women, and the procedure can only be performed by a licensed doctor or nurse midwife. (See pp. 61-22, *supra*).

The State of California does not suggest that there are any other instances of disability which involve the use of a surgical procedure which are not covered by the disability benefits provision.

3. The voluntary character of the pregnancy affords no rational basis for exclusion from benefits

In the California Unemployment Insurance Code, § 2626.2, as amended effective January 1, 1974, the adjective "involuntary" is used to qualify the noun "complication". The argument of appellant (Br. pp. 8, 19, 25-26) and of GE (*amicus* Br., pp. 6-7, 20-22) is that normal childbirth is not involuntary because no woman gives birth involuntarily, due to the availability of contraceptives and abortion to prevent or terminate an unwanted pregnancy.

There is general agreement that even today in the United States a very large percentage of pregnancies are unplanned and a lesser percentage unwanted.[60] Twenty-two percent of first births occur within the

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[60] See also Fredelle and Rona Maynard, Birth Control Accidents, *Woman's Day* (Fawcett Publications, Inc.) Feb. 1973, pp. 16,18.

first eight months of marriage.[61] Other studies indicate that there are 750,000 to more than 1,000,000 births annually in the United States that are unwanted.[62]

The report of the Commission on Population Growth and the American Future (March 1972, Signet, p. 163) states:

> According to estimates developed in the 1970 National Fertility Study conducted by the Office of Population Research at Princeton University, 44 per cent of all births to currently married women during the five years between 1966 and 1970 were unplanned, 15 per cent were reported by the parents as having never been wanted.
>
> * * *
>
> In 1970, women with no high-school education reported that 31 percent of their births in the preceding five years were unwanted at the time they conceived.[63]

A look at statistics on abortion and the numbers of infants given up for adoption show that a substantial number of unwanted pregnancies still occur.[64]

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[61] U.S. Dept. H.E.W., Public Health Service Vital and Health Statistics, Series 22, No. 12, DREW Pub. No. (HSM) 72-1009, October 1971.

[62] Larry Bumpers and Charles F. Westoff, "The Perfect Contraceptive" Population", 169 Science 1177 (1970).

[63] 1970 National Fertility Study conducted by Office of Population Research, Princeton University. See Norman B. Ryder and Charles Westoff, *Reproduction in the United States*, 1965 (Princeton: Princeton University Press, 1971).

[64] "All of the [contraceptive] methods used today are imperfect in some glaring way . . . . The results show that in an average year use failure rates were as follows: Pill, 4 percent; IUD, 7 percent; condom, 16 percent; diaphragm, 18 per cent; withdrawal, 21 percent; rhythm, 28 percent; foam, 29 percent." Leslie Aldridge Westoff and Charles F. Westoff, *From Now to Zero; Fertility, Contraception and Abortion in America*, at 68-69 (1971). See also 293-294.

The evidence presented at the *Gilbert* trial established that due to the limits of medical technology and various moral and religious considerations of doctors and patients alike, effective contraceptive methods are not available to all women in the United States.

Doctors Forrest and Hellegers agreed that the pill was the most effective contraceptive method presently available (*Gilbert* Tr. 54, 272-273, 323-24) but went into greater detail in describing the reasons why this allegedly foolproof (GE Br. *amicus* pp. 7, 20) method was not available to all women. Moreover, Dr. Wilbanks agreed that "there are some women whom nothing could ever work on. There are certain persons who perhaps can not use anything" (*Gilbert* Tr. 628).

The pill should not be prescribed for any women with hypertensive disease, diabetes, varicosities, or muscular disease (*Gilbert* Tr. 49), nor for any tumor of the breast or uterus, even benign, or any form of heart disease, disease of the circulating cardiovascular system, liver or veins, at 274. Other women, for whom the pill may be prescribed initially, may be unable to tolerate continued use of this drug because of rapid weight gain, the development of thyroid disease, high blood pressure problems or nausea.[66]

GE (*amicus* brief, p. 20) in attributing to Dr. Hellegers the statement that considering the way the population uses the pill, there will be "one pregnancy in 100 years of exposure to intercourse" (*Gilbert* Tr. 272) failed to state that this statement was made solely with

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[66] Leslie Aldridge Westoff and Charles Westoff, *From Now to Zero: Fertility Contraception and Abortion in America*, pp. 92-100 (1971), add to the above list of those warned not to use the pill, women with a family history of phlebitis.

reference to the failure rate of the pill. Dr. Hellegers emphasized that the pill was not an answer to unwanted pregnancies because, of even those women whom doctors allow to take the pill, at least half of them stop taking it within three years of the time they start (*Gilbert* Tr. 322).[66]

Complications from use of the pill may be serious and even fatal. Accepted medical opinion exists that taking the pill involves the risk of thrombo-embolitic phenomena or blood clots, which can be fatal (Tr. 629-630).[67] The assertion in GE's brief as *amicus* (p. 20),

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[66] This statistic does not include those women who intentionally decide to stop using a contraceptive in order to conceive (*Gilbert* Tr. 322).

[67] Reporting of complications arising from pill use is presently limited to the more drastic consequences such as thromboembolitic disease. The incidence of minor complications such as ovulation-suppression following termination of pill medication is not currently being recorded (Forrest, Tr. 87-88).

One article on contraceptive technology made the following comment on oral contraceptives after noting the increased risks of thromboembolic disease in women taking the pill:

> Other side effects which are less well understood relate to biochemical or metabolic abnormalities observed with varying frequency in pill users. About 50 have been described thus far, and it is possible that the hormones contained in the pill produce biochemical, structural or functional alterations in every organ and tissue . . . the contraceptive effect of the pill results from interference with the extremely delicate and complex hormonal mechanism which control the menstrual cycle, ovulation and the reproductive process. This elaborate control system is thrown out of balance, and contraception is achieved by means which can be compared to using a sledge-hammer to kill a mosquito.

Oscar Harkavy and John Maier, "Research in Reproductive Biology and Contraceptive Technology: Present Status and Needs for the Future.", *Family Planning Perspectives*, Vol. 2, No. 3, at 6 (June 1970).

that the pill is commonly regarded as safer than childbirth, was shown by Dr. Hellegers to be meaningless. He said (Gilbert Tr. 319-320):

> [B]efore you are allowed to go on the pill you have to have a physical examination. If you have cancer, liver disease, high blood pressure, heart disease, a whole slew of diseases, you are not allowed to play on the pill team, see? * * * so you have to play on the non-pill team * * * so only well people play on the pill team. The sickies play on the other team. And then you wind up with statistics that show the wellies do better than the sickies * * * The answer is in-built into the way we put people on the pill. So while it is true that those who take the pill do better than those who have childbirth, the statement is true, it gives a false impression because we have pre-screened them and allowed only the healthy ones to play on the pill team * * * so the statement is both true and meaningless, if I can put it that way.

The use of other methods of contraception is also limited by either their effectiveness or their appropriateness for certain kinds of women.[68] (*Gilbert* Tr.

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[68] The IUD has a 2-7% use failure rate (Hellegers, Gilbert Tr. 323-24), but many doctors will not insert IUDs for a woman who has never had a child or a miscarriage, or one who had undergone a previous Caesarian section. (Hellegers, Gilbert Tr. at 274-5, Forrest, Gilbert Tr. 52). The 20% explusion rate was cited as an index of the numbers of women for whom the contraceptive method is inappropriate (Hellegers, Gilbert at 275). Dr. Wilbanks conceded that the IUD did involve a certain risk of uterus perforation (Transcript at 638). Less effective methods of contraception such as the diaphragm, condom, jellies, and creams, involve less risk to the users than do the pill or IUD (see Gilbert Tr. 638). Dr. Hellegers and Wilbanks agreed that the morning after pill, the newest contraceptive alternative, was too new for everyone to know if there was significant risk involved. Dr. Hellegers indicated that it should not be considered as an accessible method of contraception for women at the present time. (Gilbert 630, 273).

275). For Catholic women, and other individuals for whom contraception creates a religious dilemma, the only acceptable contraceptive is the rhythm method; this method is considerably less effective than all other methods and in order to use it a women "must have fairly regular menstrual periods and they must adhere very strictly to abstinence during the fertile period." (Wilbanks, *Gilbert* Tr. 628).

Abortion is now recognized by many as the failsafe for women whose contraceptive methods have not been effective. There are a variety of medical reasons to advise against abortion even for those individuals who had no moral objection to the procedure. Even when abortion is performed by a licensed physician in a hospital setting, complications of infection of the uterine tract, perforation of the uterus with a subsequent necessary hysterectomy, or psychological problems may occur.[*]

In addition to these medical reasons which could cause a physician to advise against abortion, abortions as a practical matter are unavailable in many non-urban areas in the United States (*Gilbert* Tr. 278). The difficulty in obtaining abortions results in large part because many members of the medical professions will not perform abortions under any circumstances,

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[*] See also Dr. Hellegers' testimony that abortions would be medically contraindicated for women who have congenital heart disease, and, "contrary to general belief, one prefers not to do an abortion in a severely psychiatrically disturbed," (p. 276). Moreover, Dr. Hellegers indicated that: (*Gilbert* Tr. 276).

> there is beginning to be some considerable question as to whether the first pregnancy should be aborted at all. That is to say, there is beginning to be some considerable evidence that to terminate a first pregnancy considerably increases the chances in subsequent pregnancies of premature delivery.

and no Roman Catholic hospital in the United States (one-third of all private hospitals) will perform abortions on their premises.[70] (Hellegers, *Gilbert* Tr. at 277-278).

Hence, there is more than enough evidence for the Court to find that pregnancy may be an accidental occurrence for more than just a few women. Not only are there women for whom effective methods of birth control are either medically or religiously impossible to use, but the ultimate failsafe of abortion, even after the landmark decisions in *Roe* v. *Wade,* 93 S.Ct. 705 (1973), and *Doe* v. *Bolton,* 93 S.Ct. 739 (1973), is not yet a realistic alternative for women in many non-urban areas across the nation.

Moreover, even in the most carefully planned and desired pregnancies, certainly one could not claim that the resulting disabilities are voluntary, any more than would be a broken leg which resulted from a much anticipated skiing trip.[71] Dr. Forrest testified that the woman who becomes pregnant does not voluntarily bring on disabilities that may arise in any different manner than the person who drinks alcohol voluntarily brings about the condition of alcoholism. He also asserted that if the fact that excessive smoking contributes to lung cancer and emphysema is accepted and

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[70] A very large number of Baptist hospitals and those administered by orthodox Jews similarly refuse to allow abortions to be performed in their facilities (*Gilbert* Tr. 279-280).

[71] In the case of disabilities arising from complications due to pregnancy, it could not be argued that the woman voluntarily chose to undergo such conditions. Moreover, even in the normal, voluntary pregnancy the disability period due to childbirth can be distinguished from the disability period due to elective cosmetic surgery.

known by a patient, and the patent continues to smoke, the respiratory disabilities he suffers are no less voluntary than those experienced by a woman who chooses to bear a child. (*Gilbert* at 48-49).

Dr. Hellegers testified that women do not engage in sexual intercourse in order to acquire the disabilities of a pregnancy any more than people who drink do so in order to develop alcoholism or individuals who ski do so in order to break a limb. Moreover, he indicated that the injuries suffered by a man who becomes involved in a street fight are more predictable than the disabilities that may befall the women who becomes pregnant (*Gilbert* Tr. 280-281).

Most women who get pregnant but who have never given birth to a child are unaware that the medical profession in the United States today assumes as a routine matter that nature has not provided women with an adequately large birth canal but rather that a surgical incision through muscles controlling the birth canal will be necessary to avoid tears even more severe than the contemplated surgical incision (See *Gilbert* Tr. 29-32, 77-79, 89, 329-332).

A woman not aware that getting pregnant would involve her in this surgical procedure can hardly be said to have voluntarily incurred it by getting pregnant any more than it can be said every woman getting pregnant on whom a doctor decides to perform a Caesarian section voluntarily brings on herself a Caesarian section.

Most women who get pregnant for the first time undoubtedly hope that they will be one of the lucky ones who go through labor and childbirth painlessly. The testimony of the medical experts in this case, with Dr.

Wilbanks testifying for GE (*Gilbert* Tr. 587) mentioned instances of women not disabled by childbirth for longer than the few hours of labor and delivery. Dr. Hellegers testified that he had seen women give birth without having been aware that they were pregnant (*Gilbert* Tr. 332). Dr. Wilbanks testified that women who had delivered had walked out of the delivery room (*Gilbert* Tr. 587).

A woman aware that women sometimes go through pregnancy, labor and delivery without any disability and believing her own history of exercise and healthy living would place her in the same class, cannot really be said to have voluntarily brought on herself any disabling conditions which she suffers. Rather, what GE regards as "normal" disabilities attendant on childbirth may indeed be diseased conditions which would not have occurred if she was truly healthy.

Other courts and arbitrators in conformity with the decision below have uniformly rejected the allegedly voluntary character of pregnancy as justifying the denial of benefits.

In holding unconstitutional the denial of unemployment benefits to pregnant women, the Supreme Court of Washington stated (*Hanson* v. *Hutt*, Wash. Sup. Ct. No. 42806, December 20, 1973), DLR 1/9/74 (No. 6), p. A-8 at p. A-9:

> Next, appellant urges that pregnant women cause or contribute to their own unemployment by the voluntary act of becoming pregnant. Assuming arguendo that pregnancy is voluntary, this does not mean that unemployment resulting therefrom is necessarily voluntary. While a woman may want to become pregnant, she may not, and often does not wish to become unemployed as a result thereof.

Recognizing that child bearing is culturally an inherent part of a woman's life, the Tenth Circuit pointed out that the assertion by the state that she could not have the right to work and be pregnant because she voluntarily got herself into that state, penalized her for being a woman. *Buckley* v. *Coyle Public School System*, 476 F.2d 92, 5 FEP Cases 773, 774 (10th Cir. 1973): In *Buckley* the court stated:

> The trial court's attempted distinction between discriminatory and non-discriminatory regulations as being whether the condition involved is one which was involuntary must be rejected. The fact, if it be a fact, that pregnancy is a voluntary status really has nothing to do with the question. The point is that the regulation penalizes the feminine school teacher for being a woman and, therefore, it must be condemned on that ground.

Similarly, in *Thornapple—Kellogg School District*, 60 LA 549, 560 (M. David Keefe, Arbitrator, 1973), the voluntary character of pregnancy was held no defense to a claim for sickness and accident benefits because a woman would thus be forced to remain barren or suffer loss of benefits. The arbitrator stated:

> Equally repugnant is the proposition that conception is controllable and results from voluntary acquiescence of the affected individual. The very substance of this argument would obviously not apply to cases of rape and would be a matter of unresolvable contention whenever assertion was made that control was essayed . . . but failed to prevent conception. Copulation implicitly is predictive of conception. Its inspiration derives out of the second most compulsive and universally imbedded drive built-in the psyche of all sentient life forms, the first being survival and the second reproduction of the species.

* * *

> Unnatural imposition of celibacy as a condition of employment * * * would insure dimunition of our human resources beyond, by far, the goal of population control and imperil continuation of the civilization which, through human effort, has thus far evolved in this nation."

4. Courts and administrative agencies in a wide variety of contexts have held that the state of a woman during labor and normal delivery is a sickness or illness

The courts have repeatedly rejected the argument that because childbirth was normal it hence was not a sickness.

In the *Queen* v. *Wellings,* 3 Q.B. Div. 426 (the Law Reports 1877-1878), the deposition of the principal witness in a rape case was offered. Under the statute (11 & 12 Vict. C. 42, S. 17(1)), the deposition could only be admitted if the witness was "so ill as not to be able to travel". There was no medical evidence introduced. The husband of the principal witness reported his wife was momentarily expecting to deliver. The argument for the prisoner was almost verbatim the principal defense argument urged here by G.E. as *amicus.* The report of the case quotes the following as argument of counsel for the prisoner:

> The case shows that nothing except pregnancy operated to prevent the deponent from attending the trial. Pregnancy is not an illness or disease, but a natural condition; therefore, although the witness may have in fact been unable to travel, such inability was not within the statute.

The decision of Lord Coleridge is reported as follows (at 428):

> We all think this conviction should be affirmed. Pregnancy may be a source of such illness as to

render the witness unable to travel and be an illness within the statute.

The above decision by Lord Coleridge was cited and followed in an early case involving the discharge of a school teacher for pregnancy. Under the statute she could not be discharged for an absence due to temporary illness. The court held the absence for pregnancy was an absence for a temporary illness and reinstated her. *People ex rel Peixotto* v. *Board of Education,* 82 Misc. 684, 144 N.Y. Supp. 87 (Sup. Ct. 1913), *rev'd.* on other grounds, 145 N.Y. Supp. 853 (App. Div. 1914). The Court stated (82 Misc. at 694, 144 N.Y. Supp. at 93):

> It is pure sophistry to argue, as does the learned counsel for respondent in his brief, that maternity is an indication of health, and therefore cannot be said to cause "serious personal illness". The same argument was urged in the *Queen* v. *Wellings* (3 Queens Bench Division 426) by the counsel for the defendants in that case; but it was overruled by the Court of the Queen's Bench.

In both the recent decisions holding that the denial of sick pay to pregnant women violated Title VII, the courts held normal childbirth to fall within the category of sickness. In *Dessenberg* v. *American Metal Forming Co.,* U.S.D.C.N.D.Oh., E.D., Civil Action No. 72-487 the court stated:

> If one penetrates the euphemisms used by the defendant, its staff, and its attorneys, it appears from the record that sick leave is granted to dry out drunken employees, and to those suffering from the abuse of tobacco, although it is refused to a pregnant woman. Such a practice of rewarding those who abuse their bodies, while punishing

ones who, to use defendant's own words, are "performing a normal function of their body (sic)" paints a rather unpleasant picture of those who are asking this Court to approve their conduct. The Court is not inclined to do so, feeling that alcoholism is at least as voluntary and deliberate as pregnancy. If sick benefits are available for one, they should be for another.

The Court also believes the guidelines of 29 C.F.R. Secs. 1604.1 through 1604.10, particularly the last section, require the Company not only to provide a maternity leave for women which ensures them a similar position when they return to work but also requires the Company to provide sick pay to the same extent that sick pay is provided for such other temporary disabilities as alcoholism, or, as the defendant delicately puts it, "dehydration and malnutrition."

To the same effect see *Wetzel* v. *Liberty Mutual Insurance Co.*, 7 FEP Cases 34 (U.S.D.C.W.D.Pa. 1974); *Goodyear Tire and Rubber Co.* v. *Local Union No. 200, United Rubber, Cork, Linoleum and Plastic Workers of America*, 6 FEP Cases 1069, Court of Common Pleas of Auglaize County, Ohio (1973); *Bravo* v. *Chicago Board of Education*, 345 F.Supp. 135, 4 FEP Cases 994, 998 (N.D. Ill. 1972); *Washington Publishers Assn.*, 39 LA 159 (Judge Nathan Cayton, arbitrator, 1962); *Clio Education Assn.*, 61 LA 37, 41-42 (James McCormick, arbitrator, 1973); *Thornapple-Kellogg School District, supra.*

For cases holding that it constitutes sex discrimination in violation of the Fourteenth Amendment not to apply the same leave policies to employees disabled by pregnancy as are applicable to employees otherwise disabled, see *Bravo* v. *Board of Education of City of*

Chicago, supra, where the opinion noted that "teacher on illness leave are allowed to draw pay for their accrued 'sick pay' days; pregnant teachers are not" and directed that an order issue providing that "for purposes of sick pay * * * the Board will be directed to treat maternity leaves as leaves due to illness;" *Williams* v. *San Francisco Unified School District,* 340 F.Supp. 438, 445, 4 FEP Cases 498, 504 (N.D. Calif. 1972); *Heath* v. *Westerville Board of Education,* 345 F.Supp. 501, 4 FEP Cases 1002 (S.D.Oh. 1972); *Monell* v. *Dept. of Social Services, City of New York,* 4 FEP Cases 883, 884, EPD ¶7765 (U.S.D.C.E.D.N.Y. 1972).

B. The Purposes of the California Statutory Disability Insurance Law Afford No Basis for Excluding Pregnancy-Related Disabilities on the Ground That They Are Costly To Cover or That They Are Not Sudden Unexpected Disabilities Because the Statute Excludes No Other Disabilities and Such Exclusion Is Inconsistent With the Basic Purpose of the Law

The purpose of the California temporary disability statute is set forth in the statute as follows (§ 2601):

> The purpose of this part is to compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury and to reduce to a minimum the suffering caused by unemployment resulting therefrom. This part shall be construed liberally in aid of its declared purpose to mitigate the evils and burdens which fall on the unemployed and disabled worker and his family.

The inclusion of pregnancy-related disabilities is within these two purposes equally as much as the other disabilities covered.

No aspect of the work scene in America makes the American woman feel so strongly that she is the victim of discrimination because of her sex as the denial of disability benefits when absent for childbirth. Her sense of discrimination is repeatedly acerbated by the fact that it is usually males who, on a large scale, are recipients over long periods of time of disability benefit checks as a result of injuries in fights, whether drunken brawls or hot-tempered disputes, alcoholism, drug abuse, injuries from automobile accidents while driving recklessly or under the influence of alcohol, sports accidents and analogously caused disabilities. Most women workers today are hard pressed to make ends meet even when they receive regular earnings. Such a woman cannot understand why males so disabled should draw checks but she is not eligible when, as she sees it, she is engaged in the socially approved conduct of bringing a child into the world. See testimony of Arlene Avery, *Gen. Ry.*, April 19, 1973, pp. 81-82, 85-86.

This sense of the incongruity of paying benefits for alcoholism but not for childbirth was shared by Judge Young when he ruled that sick pay must be provided to women disabled by pregnancy "to the same extent that sick pay is provided for such other temporary disabilities as alcoholism, or, as the defendants delicately put it, dehydration and malnutrition." *Dessenburg* v. *American Metal Forming Co.*, U.S.D.C.N.D.Oh. Ed, Civil Action No. C-72-48-T, Judge William J. Young, October 3, 1973.

California pays disability benefits to every disabled worker, including alcoholics, drug addicts and sexual psychopaths unless they are confined in an institution pursuant to commitment or court order (Section 2678) excepting only women disabled by normal childbirth.

A woman who is not physically able to work because of pregnancy-related conditions has a greater need of sickness and accident insurance than other employees who cannot work.[72] The loss of her source of income may be injurious to herself and her future offspring in a way not possible from loss of income to the non-pregnant employee. Dr. Hellegers testified (*Gen. Ry.* Tr. 160-163):

> Q. * * * Assuming that these are the reasons that industry provides sick pay in cases of absence for temporary illness and accident, is there anything from a medical point of view which would indicate that a distinction should be made between providing income maintenance for loss of time from work due to other disabilities?
>
> A. I would not distinguish say a complication of pregnancy, say heart disease in pregnancy, from heart disease in non-pregnancy or heart disease any place else.
>
> Q. In terms of needing to have income maintained and be home without financial worry, be at home or hospitalized?
>
> A. At most I might say there would be more reason in pregnancy to the extent that the pregnant person must at least have enough income to feed the unborn child or to get good nutrition. So I would say that here it is not just a question of personal recuperating, it is also a question of the quality of the product that one is building at that time, namely the child.

Dr. Hellegers further stated that a deficient diet could adversely affect her future offspring (*Gen. Ry.* Tr. 166-170, 178-183, 203-204; *Gilbert* Tr. 265-288, 334-339). Dr. Hellegers called attention to the fact

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[72] In 1967, 61% of the working women had husband who earned less than $7,000 per year. *1969 Handbook on Women Workers*, Women's Bureau Bulletin 294, U.S. Dept. of Labor, p. 34.

that a deficient diet for even the last two or three months of pregnancy in a person who theretofore had a high protein diet could produce increased infant mortality and prematurity as was the experience in Holland in the winter of 1944-1945 when supplies were cut off by Nazis (*Gen. Ry.* Tr. 181-182; *Gilbert* Tr. 286-287). Dr. Hellegers pointed out that the smaller birth weight reflecting a deficient diet indicated prematurity and often imposed a heavy burden on society because such a child was often handicapped by mental retardation, cerebral palsy or other central nervous system defects. (*Gilbert* Tr. 265-266, 286-287, 334-337). Dr. Hellegers cited (*Gen. Ry.* Tr. 166-184; *Gilbert* Tr. 265-267) studies which showed a positive correlation between low income and infant mortality and between low income and smaller weight at birth. U. S. Dept. of Health, Education and Welfare, National Vital Statistics System Series 22, No. 15, *Infant Mortality Rates, Relationship to Mothers' Reproductive History*, p. 25, Table 16 (Government Printing Office, April 1973); National Vital Statistics System Series 22, No. 8, *Variation in Birth Weight, Legitimate Live Births*, p. 23, Table 11 (Government Printing Office 1968).

In addition to the effect on diet, the effect in quality of medical care is equally dramatic. Dr. Hellegers testified that "the quality of the medical care one can obtain is I think a function of income in the United States" (*Gen. Ry.* Tr. 201; cf. *Gilbert* Tr. 264-265, 285-287) that the effect of "the inability to receive private and experienced care "means the difference between" that kind of care that comes with a physician having spent many years in practice" and "being attended to by a medical student or somebody of lesser experience" (*Gen. Ry.* Tr. 202).

The women who are in the work force today are there because they need the income from their paycheck to survive. Seventy per cent of the women in the labor force are either single or have husbands making less than $7,000 a year. To quote the Department of Labor, "Millions of the women who were in the labor force in March 1972 worked to support themselves or others. This was true of most of the 7.5 million single women workers. Nearly all the 6.2 million women workers who were widowed, divorced, or separated from their husbands—particularly the women who were also raising children—were working for compelling economic reasons. In addition, the 4.1 million married women workers whose husbands had incomes below $5,000 in 1971 almost certainly worked because of economic need. Finally, about 3 million women would be added if we take into account those whose husbands had incomes between $5,000 and $7,000—incomes below the $7,200 estimated by the Bureau of Labor Statistics for a low standard of living for an urban family of four."[12]

The combined necessity of women to work, and the discrimination because of sex which women encounter in the work place, has resulted in extensive poverty. The *1970 Report on the President's Task Force on Women's Rights and Responsibilities* entitled, "A Matter of Simple Justice," U. S. Government Printing Office, 1970, p. 18 stated:

> Sex bias takes a greater economic toll than racial bias. The median earnings of white men employed year-round fulltime is $7,396, of Negro men $4,777,

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[12] U.S. Dept. of Labor, Employment Standards Administration, *Why Women Work*, p. 1, June 1973 rev.

of white women $4,279, of Negro women $3,194. Women with some college education both white and Negro, earn less than Negro men with 8 years of education.

Women head 1,723,000 impoverished families, Negro males head 820,000. One-quarter of all families headed by white women are in poverty. More than half of all headed by Negro women are in poverty. Less than a quarter of those headed by Negro males are in poverty. Seven percent of those headed by white males are in poverty." (footnotes omitted)

To update the figures above, in 1972 the median income for white men working year round full time was $10,918, of Negro men $7,373, of white women $6,172, of Negro women $5,280. U. S. Dept. of Commerce, *Current Population Reports, Consumer Income,* Series P-60, No. 87, June 1973. Women headed 2,100,000 impoverished families. U. S. Dept. of Labor, Employment Standards, Women's Bureau, *Facts About Women Heads of Households and Heads of Families,* April 1973, p. 8.

With these millions of women dependent for their living on their jobs, the fact that it is childbirth that sends them to the hospital and stops their pay check, seems to afford not the slightest basis for saying that they are not sick whereas whatever it is that keeps a male at home is sickness.

It will be recalled that the second of the two-fold purposes of the California disability system was to "avoid the necessity for resorting to costly relief programs" (p. 32, *supra*). The failure to pay benefits to women disabled by childbirth, forces them to go on

relief, thus defeating this purpose of the legislation. The plaintiff, Aiello, was on welfare, according to her Affidavit, filed in this case. In each the *Stromberg-Carlson* case (Betty Williams, *Stromberg* Tr. 260-264) and the *Gilbert* case (Sherrie O'Steen, *Gilbert* Tr. 224) one of the complainants had been forced to go on welfare when her income stopped due to pregnancy. Betty Williams had to abandon her private physician and accept delivery as a welfare patient (*Stromberg* Tr. 2). Sherrie O'Steen testified without contradiction that before her first welfare check arrived she had no money to pay her electric bill, with the result that her electricity was cut off leaving her and her two-year old daughter without light, heat, refrigeration or cooking facilities (*Gilbert* Tr. 224-226).

This Court in recent years has had several cases before it where the facts disclosed an indigent pregnant woman, *Shapiro* v. *Thompson,* 394 U.S. 618, 89 S.Ct. 1322 (1969); *Doe* v. *Bolton,* 410 U.S. 179, 93 S. Ct. 739, 744 (1973). See also the recent series of cases in the federal courts in which the issue has been whether the unborn fetus is a person within the meaning of the Aid to Families With Dependent Children Act, 42 USC 601. *Jone Doe* v. *Lukhard,* No. 73-2179, (4th Cir., February 26, 1974); *Wilson* v. *Weaver,* No. 72-1960 (N.D. Ill. 5-23-73); *Green* v. *Stanton,* Civ. Act. 73-719 (N.D. Ind. 7-2-73); *Harris* v. *Mississippi State Dept. of Public Welfare* (N.D. Miss., August 15, 1973); *Alcala* v. *Burns,* 42 L.W. 2111 (S.D. Iowa, Aug. 29, 1973); *Carver* v. *Hooker,* Civ. Act. 73-87 (D.C. N.H., 11/30/73); *Whitfield* v. *Minter,* Civ. Act. 73-3051 (D.C. Mass. 12/26/73); *Stuart* v. *Kanary,* Civ. Act. 72-452 (N.D. Oh. 12/27/73); *Wisdom* v. *Norton,* Civ. Act. 15,906 (U.S. D.C. Conn. 1/3/74).

Additional purposes appear in the legislative history developed when Congress enacted the first federal temporary disability program in 1946, namely that for railroad workers (see pp. 35-36, *supra*). The primary purpose of that program was also to provide employees with insurance against financial problems during periods when they were disabled from working. The hearings on the railway disability bill pointed to the conditioning of benefits on the securing of medical care as an addition purpose of temporary disability plans designed in the same way as the California plan is designed. This purpose is equally applicable to pregnancy-related disabilities. Plans such as that adopted by the California legislature which condition the receipt of benefits on a physician's certification of disability encourage employees to receive medical attention as soon as possible.[74]

With respect to pregnant women, encouraging them to secure medical care by requiring a certificate from a physician before they can draw disability is obviously of great importance to her health, and could minimize any disabilities she might suffer. Thus, a third purpose of temporary disability plans is to minimize the severity of an employee's disability. This is also a recognized purpose of the social security programs in Europe as applicable to pregnant women. See Dr. Hellegers, *Gen. Ry.* Tr. 251-253.

Another purpose of sickness and accident plans is to foster higher employee morale, better worker-manage-

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[74] Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 1362, 79th Cong., 1st Sess., at 286, hereinafter Hearings on H.R. 1362.

ment relations and increased productivity.[75] Dr. Hellegers testified (*Gen. Ry.* Tr. 164-165):

> Q. Do the disabilities which a woman suffers from a normal childbirth, say if she's going to be disabled for a certain number of hours or days, do these disabilities differ from disabilities from other causes in any way which would make sick leave with pay any less reasonably related to increased production in cases of absence from work due to childbirth than in the case of others?
>
> A. I would say, no.

This relationship between employees' well-being and employers' self-interest was recognized by Congress. The railroad workers' disability insurance was viewed as an aid in maintaining an employment relationship that would encourage employees to return to the employer upon recovery.[76]

The insurance industry generally does not regard pregnancy as creating an uninsurable risk when it comes to paying the hospital or doctor's bills for the prenatal care, delivery and post partum care, with respect to wives of male employees as well as in instances of female employees.

The *1964-1966 National Natality Survey* showed that 59 per cent of mothers of legitimate live births during 1964-1966 "had insurance to pay the physician bills during pregnancy, the physician bills for delivery of the baby, or the bills for hospital care at the time of delivery." Vital and Health Statistics Series 22,

[75] National Industrial Conference Board, *Preparing for Collective Bargaining*, Studies in Personnel Policy, No. 172, p. 128 (1959); Donna Allen, *op. cit.*, pp. 23, 31, 34, 35.

[76] Lester P. Schoene, representing the Committee of the Railway Labor Executives' Assn., Hearings on H.R. 1362 at 1112.

No. 12, *Health Insurance Coverage for Maternity Care: Legitimate Live Births, U. S. 1964-1966* (U. S. GPO 1971), p. 5.

Certainly pregnancies are no more involuntary and insurable for hospital and doctor bills than for sickness and accident benefits. Actuary Jackson so admitted (*Gilbert* Tr. 377).

There is nothing in the language of the statute or in its legislative history to suggest that only the "unexpected" disability was to be covered,[77] or only the less expensive instances of disability.[78]

The medical profession has repeatedly supported the position that disabilities arising from pregnancy should be covered equally with other disabilities under a temporary disability insurance plan. See the 1912 participation of a committee of the American Medical Association in the preparation of a model health insurance act covering income maintenance during disabilities due to childbirth (pp. 23-24, *supra*). The Rhode Island Medical Association's protest that it violated true social security principles to amend the Rhode Island Temporary Disability Act to place a lower maximum on the number of weeks of benefits payable to women disabled by childbirth than were payable in other disabilities (pp. 30-31, *supra*).

Dr. Hellegers testified in both the *General Railway Signal case* (Tr. 161-166, 224-229) and the *Gilbert* case (Tr. 261-265, 284-285) and Dr. Forres testified in the *Gilbert* case (Tr. 41-44) in answer t

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[77] Brief of Appellant, pp. 8, 19, 25-26; Brief of GE as amicus pp. 6-9, 15-16, 20-23.

[78] Brief of Appellant, pp. 8, 13-16, 30-34; Brief of GE as amicus pp. 9, 22-27, 28-31; Brief of M&M as *amicus*, pp. 41-47.

a hypothetical question setting forth the purposes for which temporary disability payments were made, that there was no rational basis for distinguishing between normal childbirth or other disabilities connected with pregnancy and other disabilities.

1. The cost figures submitted by the State of California and various amici are grossly exaggerated

There are seven obvious respects in which the figures submitted by the State of California, appellant and various *amici* overstate:

(1) The figures are based on experience under mandatory leave plans where employees were forced by the employer to go on unpaid leave without regard to disability;

(2) Periods of absence based on abnormal or complicated pregnancies are included;

(3) The figures are based on the assumption women will malinger rather than draw benefits only during a period of actual disability;

(4) It is also assumed that physicians will certify women as disabled without regard to the truth;

(5) Out-of-date birth rates are used, ignoring the fact that birth rates have fallen substantially over the past two decades;

(6) The figures do not reflect the well-established fact that women who work have fewer babies than the national birth rate and that as women have opportunities for advancement and higher wages they have still fewer babies;

(7) The benefit rates used fail to reflect that women have average wage rates only 60% as high as males and accordingly draw benefits at the bottom of the scale of benefits.[79]

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[79] Points 1 and 5 insofar as the relevant data is in the public domain, are covered in the brief *amicus curiae* of the AFL-CIO and Points 1, 3, 4, 6 and 7 are covered in this brief to the extent that the relevant data is in the records of cases to which the IUE is a party.

(a) There are no known statistics with respect to the average period of disability due to pregnancy and childbirth

The cost estimates in the brief of GE as *amicus*, pp. 25-27, are based on the assumption that the average length of disability will be many times longer than any evidence supports. According to GE, Actuary Jackson based his figures on an average disability period of 15 weeks (GE Br. as *amicus*, p. 25); Baille based his figures on an average period of either 20 or 30 weeks (*id.*, p. 25, fn. 18). Thus these estimates are based on the assumption women disabled by pregnancy will be absent from work for long periods of time. There is no experience upon which it can be estimated how long women will be absent if they are permitted by employers to work as long as they are medically certified as able and to return as soon after childbirth as they are cleared by their doctors for resumption of work.

Actuary Jackson, called as an expert by GE in the *Gilbert* case, and one of the actuaries whose estimates GE cited to this Court (GE Br. *amicus*, p. 25) testified (*Gilbert* Tr. 387):

> I assumed that the average benefit payment would run 13 weeks under 13-week plans, 23 weeks under 26-week plans and 30 weeks under 52-week plans.

Actuary Jackson admitted (*Gilbert* Tr. 391-392) that the only factual data he had with respect to the length of absence of pregnant females was the exhibit handed to him by counsel for GE reflecting GE's experience, which are quoted by GE (Br. *amicus*, p. 25, fn. 19). These figures are for the years 1970 and 1971. At that time GE required mandatory leave. The record in the *Gilbert* case contains numerous employee handbooks and notices to employees stating that a pregnant employee must take a maternity leave at the beginning of the sixth month of pregnancy in some plants and at

later fixed dates of the pregnancy in other plants and not return until six to eight weeks after childbirth.[80]

The fact these figures reflect enforced periods of absence unrelated to inability to work make it clear that GE's estimated costs are many times too high. The medical experts, those called by GE, Stromberg Carlson and General Railway Signal, as well as by the female plaintiffs in these cases all agreed that 85 to 95% of women could work until the onset of labor and return within two to six weeks thereafter, with three weeks the average time (*Gilbert* Tr. 11, 20-22, 65, 239-241, 244-256, 583; *Stromberg Carlson* Tr. 108-110, 130, 117-118; *Gen. Ry.* Tr. 144-155, 217). Cost figures based on 13, 20, 24, 25, 30 or 32 weeks off are obviously grossly overstated.

The contention that GE's experience "regarding the duration of pregnancy absences prior to delivery" supported Actuary Jackson's figures, (GE Br. as *amicus*, p. 25, fn. 11), also brings into the picture irrelevant data because the periods of leave included leave

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[80] E.g., the employees at the Salem, Virginia plant of GE had never been told that the latest employee handbook (*Gilbert* Plaintiffs' Ex. 17B) containing a mandatory leave provision requiring the beginning of leave not later than the end of the sixth month, was no longer in effect (Pre Trial Stip. No. 23). At Murfreesboro, Tenn., under date of January 15, 1973, GE informed employees maternity leave had to begin not later than the beginning of the 6th month (*Gilbert* Plaintiffs' Ex. 18, Pre Trial Stip. No. 26). (Plaintiffs' Ex. 48, 49, 52, 53, 54, Pre Trial Stip. §§ 24-25, 27; Answer of GE to Interrogatories 68-69, Exh. B). Since only 5% of the babies are born on the expected due date, although a larger percentage are born on that date than any other date (Dr. Hellegers, *Gen. Ry. Tr.* 263), the distribution of births set out in GE's Br., *amicus*, pp. 25-26, fn. 19, reflects the combination of GE's mandatory leave policy and the natural distribution of birth dates, together with some complication cases.

due to abnormal or complicated pregnancies as well as mandatory maternity leave.[21] The figures quoted (GE Br. *amicus*, p. 25, fn. 19) include absences due to all the various abnormalities and complications of pregnancy, excepting only abortions, miscarriages and Caesarian sections. The figures on which the percentages were based appear in the record in the *Gilbert* case in Revised Answer by GE to Plaintiff's Interrogatory No. 45, which shows "Pregnancy Absences Prior to Delivery—Total Company—Normal Delivery". In prior responses to Interrogatory No. 45, GE had explained that the term "normal delivery" excluded only miscarriages, abortions and Caesarian birth.

(b) Claim abuse and malingering is no more likely to occur with respect to pregnancy-related disabilities than other disabilities

In arguing that the cost of covering pregnancy-related disabilities is so great as to afford a reasonable basis for their exclusion, the appellant (Br., pp. 19-20, 32-35), GE (Br., *amicus*, pp. 9, 25) and M and M (Br., *amicus*, pp. 6-9, fns. 5-9) make, as one of their contentions, the point that allegedly women would abuse the right to disability pay to such an extent as to bankrupt the system. It is dubious that this contention is at all relevant to the issue remaining in the case now that the state of California has decided to cover all abnormal and complicated cases. The normal pregnancy presents no opportunity for malingering. Once there is

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[21] GE as *amicus*, Br. p. 19, correctly summarizes the testimony of the expert medical witnesses in the *Gilbert* case that approximately 10% to 15% of women have complications associated with pregnancy (Tr. 56-57, 295). But not all such complications require a woman to stop work (Tr. 24): only 1% to 2% of the women with complications have those that could be classified as major (Tr. 57) and of this very small percentage only some require hospitalization (Tr. 58).

malingering, the abnormal or complicated is by definition present and already covered.

Actuary Jackson, whose estimates of cost are cited by GE in its brief *amicus* to this Court (pp. 23-27), insisted that costs of covering pregnancy-related disabilities would be greatly increased because malingering in this type of claim would be particularly difficult to control (*Gilbert* Tr. 350-353, 357-359). Actuary Jackson admitted on cross-examination that his testimony in this regard was not based on a single instance of claim abuse in connection with a claim for benefits during a pregnancy-related absence (*Gilbert* Tr. 366-367; see also Tr. 357-359). Nevertheless, in estimating the cost of including pregnancy-related disability coverage under presently existing plans of temporary disability benefits in private industry, he made the assumption that every woman who worked under a plan which provided disability benefits for 16 or 18 weeks would claim benefits for the full 16 or 18 weeks (*Gilbert* Tr. 400-401). On cross-examination Actuary Jackson testified (*Gilbert* Tr. 400-401):

> Q. You made no assumption that the woman would work up until she was actually disabled, did you?
>
> A. No. I rather went at it from the other end and assumed an average benefit period for the purpose of determining an average.

He also assumed the woman would get a physician's certificate that she was disabled for the full period. He testified on cross examination (*Gilbert* Tr. 400-401):

> Q. But you had no figures, no data that would show you whether it is 16 or 18 weeks represented a period that she claims she was unable to work and that it was not affected by the employer re-

quiring her to go off when she was able to work. You don't know which that figure represents. You have no basis for thinking the 16 to 18 weeks represented a period that she was actually medically disabled to work, that the doctors would certify she was unable to work?

A. In essence what I have assumed is that with the benefit plans we have here that these will be the approximate amounts of claim costs under those plans, and if under those plans in order to obtain a benefit an individual needs a physician's statement then that assumption is inherent in my figures.

Q. The 16 to 18 weeks, did you know whether that represented any physician's certification that she was disabled for 16 to 18 weeks?

A. No.

Q. But under the plan she would only get paid for the period she was—had a certificate from the company—from the physician that she was disabled—wouldn't she?

A. Well, you have more faith, perhaps, in the fact that these plans are going to operate the way they are supposed to than I do. As an actuary I am a little suspicious, and perhaps would be inclined to assume that if she has been out for 16 to 18 weeks that in the future if 50% of pay is paid to her during that period she will be out 16 to 18 weeks plus a few more.

The contention that women will malinger or otherwise abuse the right to disability benefits is baseless. First, except with respect to women in the lowest bracket covered, $75 to $524.99 per quarter, the disability benefit is so small compared with the wages which a woman earns that rarely can she afford the loss of the difference between her regular earnings and the small disability benefit for which she would be eli-

gible if she went on disability leave.[22] Actuary Jackson testifying for GE in the *Gilbert* case, described the differential between wage rate and benefits as one of the controls designed to reduce or discourage malingering: "Use of a limitation on the amount of benefits, such as 60 percent of pay or 65 percent of pay" provides a financial incentive to return to full time employment and get full pay" (*Gilbert* Tr. 353).

Second, when questioned on cross examination about malingering, Dr. Hellegers volunteered that, "One be-

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[22] The median earnings of women in California in 1969, the last year for which figures were available, as shown by the Department of Commerce, *1970 Census of Population, Characteristics of the Population*, issued April 1973, with respect to the State Standard Metropolitan Statistical Area of 250,000 or more, "Occupation of the female experienced civilian labor force" was $4,237. This places the average woman in the quarterly bracket of earnings $1050 to $1074.99, for which the weekly disability benefit is $47, or $611 for 13 weeks. Thus the average woman would lose $448 a quarter by going on disability. And but for the sex discrimination which results in her average wages being only 57 per cent of her male counterpart, if she earned the same as the average male $9,728, her weekly disability benefit would be $109 a week and her loss by going on disability leave for 13 weeks would be $1,015. A research project financed by the Department of Labor, investigating job satisfaction generally and without any focus on sex discrimination showed that considering the education and experience of female employees as compared with male employees, "the average woman should have received 71% more than her current income to make her income equivalent to a man with the same scores in the achievement variables" (p. 246); "The mean difference between men and women in observed incomes, without the imposition of controls was $4,372. Only $914 of this difference could be attributed to the achievement factors measured. The remaining—$3,458—represented, in part at least, a disparity caused by illegitimate or discrimination factors (at pp. 251-252). Teresa Levitan, Robert T. Quinn, and Graham L. Staines, "Sex Discrimination Against the American Working Woman," *American Behavioral Scientist*, Vol. 15, No. 2, p. 237 (November-December 1971).

gins to see in Europe where various schemes of this nature exist, that women have a tendency to continue work even though they have an opportunity to participate in maternity benefit schemes * * * because they find it a pain in the neck not to do so". (*Gen. Ry. Sig.* Tr. 242).

Third, if there would be any difference in this respect between non-pregnancy and pregnancy-related claims, the evidence indicates there would be less rather than more malingering in making pregnancy-related claims. Dr. Forrest, testifying in the *Gilbert* case (Tr. 46) diagnosed malingering as a psychological problem with no sex differentiation. Both Dr. Forrest (*Gilbert* Tr. 46-47) and Dr. Hellegers (*Gilbert* Tr. 270-271, 314, 338) were emphatic that there is no aspect of pregnancy which would contribute to malingering. Dr. Forrest in this connection volunteered that laymen might assume women would "encourage a little bit of sympathy" towards "protecting motherhood", but it was his considered medical judgment that this is not so (*Gilbert* Tr. 47).

Fourth, Dr. Hellegers pointed out (*Gen. Ry.* Tr. 243) (*Gilbert* Tr. 270-271) that from a medical point of view, malingering in pregnancy was much more difficult to get away with. He testified in the *General Railway Signal* case (Tr. 243):

> Q. Is it easier to determine malingering in obstetrics than it is in some other field of medicine?
>
> A. There are just so many things that you can malinger about when you are pregnant and we have access to where the action is, the uterus and its contents, much more than internal medicine has access to the pancreas and the liver and the heart and so forth. I mean just simple vaginal

examination eliminates all bleeding and all placental abnormalities you'd have. The pregnancy is much more on the surface of things, if you like, than the kind of things that men malinger about like headaches and urological signs and things that are less obvious. I mean obstetrics is not a very sophisticated or complicated kind of a specialty compared to internal medicine.

And in the *Gilbert* case (Tr. 270-271, 338):

The uterus is an awfully superficial thing, and under the skin. Access to the mouth of the uterus or the cervix is extremely easy. So it would be very difficult to fake those conditions which are peculiar to the uterus and to the uterine contents. Separation of the placenta, I don't think you could fake. Vaginal hemorrhaging is impossible to fake because all you have to do is check and see if the blood is coming or not coming.

So I don't really see where you could—where it would be easier to hide things in an organ that lies right under the skin that you can look at through a speculum than it would be in terms of, you know, whether one's liver was acting up or whether one's ulcer was acting up. It would be considerably more difficult. It would be much more difficult to pick up whether somebody's ulcer was acting up rather than somebody's uterus was acting up because the uterus is a very accessible organ.

* * *

Malingering on the basis of pregnancy as it affects the uterus and its contents is extremely easily picked up because you have access to the organ in that it is so superficial and you have access to find out if there is any bleeding. I don't quite know what it is one would malinger about, but that doesn't mean that a woman couldn't malinger as well on double vision as a man could.

In *Wetzel* v. *Liberty Mutual Insurance Co.*, 7 FEP Cases 271, U.S.D.C.W.D.Pa., No. 72-169, February 20, 1974, in denying a motion for reconsideration of his ruling that denial of disability pay violated Title VII, Judge Weber rejected emphatically the contention women will stay home and collect disability pay longer than they are in fact disabled. He stated (7 FEP Cases at 272):

> The court cannot understand why the disability from performing work due to pregnancy and childbirth cannot be medically determined in the same way that disability from performing work is medically determined in all other disability cases. For a half century or more in this country, and for over a century in European countries these matters are decided in hundreds, if not thousands, of cases daily.
>
> Finally, the Defendant argues that "because employees can, in some situations, make as much or more money by receiving disability income it can be assumed that females on pregnancy leave of absence will remain at home longer than normal". The Defendant presented absolutely no evidence to support this argument and as a trial judge who has seen hundreds of cases of soft tissue damage arising from the so-called "whip lash" type of injuries which produce few observable objective symptoms the court sees no basis for assigning the tendency to malinger as a sex-related characteristic. If, as defendant suggests, the employee can make as much or more money on disability than at work be true, then the fault lies with the particular insurance plan and not with the female sex. The motion for reconsideration will be denied.

(c) The assumption that doctors will dishonestly certify disabilities without regard to the truth is unfounded

The appellant (Br. pp. 32-33) argues that doctors will certify claims of disability for pregnant women

without regard to disability. The cost estimates of Actuary Jackson were admittedly based on the assumption that doctors would certify disability for any period the woman requested (*Gilbert* Tr. 400-401). This assumed a state of dishonesty in the medical profession. There is no basis for assuming such a state exists. If the medical profession fails to appreciate the unethical and illegal character of such conduct, policing by the medical profession itself or law suits against dishonest doctors who aid patients in filing false claims should correct this problem (*Gilbert* Tr. 333). Assumptions about the dishonesty of doctors cannot properly be the basis for greatly exaggerating the costs of the inclusion and then justifying the exclusion on this basis.

(d) The birthrate of women who work is less than the general birthrate

As of June 1972 the number of children of working women as opposed to non-working women varied by age group as follows: [33]

Children ever born per 1,000 women

Women aged	In labor force	Not in labor force
16-24 yr.	210	502
25-34 yr.	1,542	2,401
35-44 yr.	2,724	3,563

There is no available evidence as to how many of the children which these women had accumulated by the age of 35 to 44 group were born as a result of pregnancies which began when the mothers were working.

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[33] U.S. Dept. of Commerce, Series P-20, No. 248, Table 16, 1973.

In estimating costs of covering women, Actuary Jackson corrected only .09 (Gilbert Record, Defendant's Exh. 42, p. 2) to adjust for the fewer children born to women in the work force. The above quoted figures indicate that the correction should have been at least 20%. The correction leaves the figure on birth rate which he used much too high. There is no indication that any of the other calculations relied upon by appellant and amici made corrections based on the markedly reduced birth rate of working women. [84]

(c) The weekly benefit used in calculating costs ignored the fact women get only 60 per cent as much in pay as men and therefore had a lower benefit rate

Throughout the United States women earn on the average only 60 per cent as much as males. [85] In the State of California the gap is even greater. The average female in the last year for which figures are available, 1969, earned only 57 per cent as much as the average male. [86] Based on the median wage rate of a

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[84] The actuarial study by Baille in evidence in the *Gilbert* case (cited GE Br. *amicus* p. 25, fn. 19) shows on its face that he used the average birth rate for the population as a whole and made no corrections for the fewer births to working women. *Gilbert* record, Defendant's Exh. 13.

[85] U.S. Dept. of Labor, Fact Sheet On The Earnings Gap (1973), based on U.S. Bureau of Census, Dept. of Commerce, Population Reports, P-60.

[86] U.S. Dept. of Commerce, 1970 Census of Population, Characteristics of the Population, Vol. 1, Part 6, California, Section 2, issued April 1973, California 6—1773 shows median earnings of males who worked 50 to 52 weeks in standard metropolitan statistical areas of 250,000 or more in 1969 as $9,728. The comparable figure for females (California 6-1841) is $5,637. From the same tables the comparative figures for all earners, not only those who worked 50 to 52 weeks is males $8,552, females $4,237.

full time experienced metropolitan area female in California, the weekly benefit rate under the California Unemployment Insurance Code § 2655 is $47 a week.[87] Actuary Jackson used as the average benefit rate $75 per week (Gilbert Record, Defendants Ex. 42, p. 2). The actuarial study by Alexander J. Baille (cited in GE Br. *amicus*, p. 25, fn. 18) was also computed on an average benefit of $75 per week (*Gilbert* Record, Defendants Ex. 13). This is much higher than the average benefit of $47 per week for the full time experienced female and the $47 is even high because of the large number of female wage earners in California who do not work 50 to 52 weeks and are not in metropolitan centers.

In 1970 the average daily sickness and accident benefit paid by GE to males was $12.33, to females $9.18, in 1971, to males $13.27, to females $9.97[88]

Actuary Jackson in making the cost estimte cited in GE's brief *amicus* (p. 25) did not base his figures on average benefit paid. Rather, he used the "average benefit in force" under the "new plans" listed in the 12th annual survey 1971, Health Insurance Institute (*Gilbert* Tr. 406). Actuary Jackson under cross examination explained his term "average benefit in force" (*Gilbert* Tr. 409):

> Q. These new plans, you have had no experience under the new plans. You are telling us what could be paid, not what was paid?

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[87] See p. 93, fn. 82, *supra*.

[88] *Gilbert* record, Plaintiffs' Ex. 37B, Plaintiffs Fourth Interrogatories to Defendant and Plaintiffs' Exh. 35C, Answers by GE to Fourth Interrogatories 72-75. The figures cited in the GE Br. *amicus*, p. 24, fn. 16 represent cost, not benefit figures.

A. No. We are saying what is the average benefit in force.

Q. How do you figure what is the benefit in force?

A. Well, let me give you an illustration. If a plan is issued and there are 100 people covered and 50 of them have a weekly benefit amount of $40, and 50 of them have a weekly benefit amount of $60, the average benefit in force would be $50.

In addition, Jackson failed to take into account that women earn only 60% as much as men. On cross examination he testified (*Gilbert* Tr. 412):

Q. Did you know when you figured the amount how many employees were at each level, male and female, of the scheduled benefits?

A. No.

Q. You took an average without a female breakdown?

A. That's right.

Therefore, if the average benefits for women were looked at separately, the figure would be substantially lower than the average for both men and women.

2. There is no greater failure of females to return to work after childbirth than the turnover rate of employees of like pay and status

As still another item of cost, appellant (Br. 21, 36), (GE Br. *amicus*, pp. 9, 26-27) and (M & M Br. *amicus* p. 6, fn. 5) argue that half the women having babies will never return to their jobs after childbirth but instead will use their disability pay as severance pay. So far as we have been able to ascertain there are no nationwide figures available as to the number of women

who return to work following childbirth. And if there are such figures, the practice of treating a pregnant woman as a voluntary quit who can only come back as a new employee without seniority and if there is a job available is so widespread as to make meaningless any figures respecting alleged failure to return.

In 1965 a survey of 1,000 employers with respect to maternity cases showed that only two-fifths of the offices granted maternity leaves; three-fourths of the plants (mostly unionized) granted leaves. * * * They tended to require early "retirement" from the working scene—sometimes as soon as a pregnancy was "obvious".[*] Absence of maternity leave usually meant a discharge for absenteeism with loss of all seniority and pension rights. Catherine East, Executive Secretary of the Presidentially appointed Citizens Advisory Committee on the Status of Women, testified as an expert witness for the plaintiffs in the *Gilbert* case and stated that she had done research as part of the duties of her job with respect to practices of industry respecting the return of women to employment following childbirth. She testified that "most apparently had no reemployment rights except preference for vacancies", that "some employers almost designed their practices to force women to quit work at the time they had children" and that these practices "seemed to have been designed by upper middle class men who, you know, were trying to get all women or hoped or seemed to assume all women could

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[*] Prentice-Hall, *Personnel Management, Policies and Practices*, Report Bulletin 25, Vol. XIX, p. 457 (1972); Elizabeth Koontz, then Director of U.S. Dept. of Labor, Women's Bureau, Childbirth and Child Rearing Leave: Job Related Benefits, 17 N.Y. Law Forum, p. 480, (1971).

follow the practices of their wives." (Gilbert Tr. 90-100). She added (Tr. 100):

> I have spoken a great deal to businessmen, including the American Mangement Association Conference, and I always raised this topic when I did. And several of the employers, these are industrial relation experts, they are not just anybody, Vice-Presidents for Industrial Relations or Personnel Directors have asked me shouldn't women be encouraged to stay home? Why should you have policies that would permit them to come back?

Historically one of the earliest and most successful of union efforts on behalf of female members was to secure for them the right to maternity leave so they would have a job to which to return following the birth of a child.[90] However unions were not always successful in securing maternity leave so adamantly did industry insist on its right to terminate female employees when their pregnancy became "obvious".[91]

The IUE had the experience of believing its collective bargaining agreement entitled the pregnant employee not to lose her job simply because of pregnancy, only to find the employer still discharging pregnant employees, so stubborn on the issue as to compel IUE to go to court[92] to secure arbitration of the

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[90] Note the above quotation from Prentice Hall mentions that the employers granting maternity leave were mainly unionized.

[91] The above cited survey conducted by Prentice Hall showed that 80% of the employers tended to require early "retirement" from the working scene—sometimes as soon as a pregnancy was "obvious".

[92] *IUE* v. *Westinghouse*, 55 LRRM 2952 (U.S.D.C.S.D.N.Y. 1964)

issue, and then losing before the arbitrator.[93] The IUE has been a party to several suits brought to secure reinstatement and restoration of pension rights and seniority for women who lost their jobs simply because of discriminatory leave policies respecting pregnacy.[94] The EEOC has numerous reported decisions attesting to the widespread practice of employers of terminating all job tenure when an employee has a baby.[95]

With the present discouragement, if not outright refusal of so much of industry to permit women to return to work, and with supervisors and personnel

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[93] *Westinghouse Electric Corp.*, 45 LA 621 (P. Hebert, Arbitrator, 1965). See also *Kupczyk* v. *Westinghouse Electric Corp.*, N.Y.S.D.H.R., Case No. CSF 15208-67, EPG Par. 26,000B.37 (March 3, 1969) holding that the discharge of an employee for pregnancy and subsequent refusal to reemploy her constituted discrimination in employment because of sex in violation of the New York State Human Relations Act, Section 296, Art. 15, N.Y. Executive Law, Ch. 119.

[94] E.g., *Mann* v. *Allis Chalmers Mfg. Co.*, Norwood, Ohio, EEOC Case No. TCLO 1015, EEOC Decision No. YCL 1246, February 24, 1971 holding that failure to grant a personal leave of absence for two weeks following the date of childbirth which was requested by her personal physician on her behalf as necessary for recuperation from childbirth constituted unlawful sex discrimination where a male employee had been granted approximately 13 months of leave of absence in order to undergo a series of back operations. IUE supported Mann's position in her court suit, *Mann* v. *Allis Chalmers Mfg. Co.*, U.S.D.C.S.D. Ohio W.D. Civil Action No. 8115, which was settled by stipulation of all the parties, after she was reinstated, her original seniority date restored and a sum of money paid in settlement of the back pay claim.

The case of *Eberts* v. *Westinghouse Electric Corp.*, U.S.D.C.W.D. Pa., Civ. Action No. 74-113 is a class suit brought by employees complaining of loss of jobs, seniority, pension rights and other benefits becausee of pregnancy.

[95] E.g., EEOC Decision No. 70-360, EPG Par. 6084 (December 16, 1969) EEOC Decision No. 71-413, EPG Par. 6084, 3 FEP Cases 233 (November 5, 1970); EEOC Decision No. 71-562, 3 FEP Cases 233 (December 4, 1970).

managers often discouraging return to work even in companies allegedly following a different policy, any contention that disability benefits constitute severance pay represents another instance of sex stereotyped thinking.

The references to the Illinois Bell Telephone Co. showing a 50% failure to return (Appellants Br. p. 21, fn. 20), is to be read in the light of the pendency of a law suit against that company in which one of the charges is that Illinois Bell Telephone Co. failed to reinstate employees seeking to return to work after childbirth. [96]

The GE experience in 1971, as cited in the GE brief as *amicus* (pp. 26-27, fn. 20) of 1,634 women who returned and 1,147 who did not, reflects a quit rate of women of 40 per cent which is exactly the quit rate at

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[96] Paragraph 7 of Complaint in *Communications Workers of America, AFL-CIO* v. *Illinois Bell Telephone Co.*, USDCNDIll. ED, Civil Action No. 73C-959. The testimony of Teresa F. Pier, Secretary of the Employees' Benefit Committee of AT&T in *EEOC* v. *AT&T*, FCC Docket No. 19143, August 1, 1972, Exhibit 5, pp. 7-8, shows that in April 1971 AT&T advised its Bell companies to delete from leave application forms language indicating there was no guarantee of reemployment, although no guarantee was made since AT&T regarded it was often impossible to get a replacement without promise of a permanent job. See also *EEOC* v. *AT&T*, 6 FEP Cases 643 (USDCEDPa. 1973). The contention (GE's br. *amicus* pp. 13, 45-46) that the fact that the settlement which EEOC approved involving AT&T did not include sick pay for pregnancy disabilities, shows EEOC is not consistently following the EEOC Guidelines, is groundless. The settlement covers only those issues on which AT&T was willing to settle and reserves all others for litigation.

That settlement agreement betwen EEOC and AT&T provided for retention of seniority rights on return from childbirth leave which theretofore had been lost. The Court observed that the union had filed charges on other aspects of pregnancy which were pending and unaffected by the settlement (6 FEP at 645, 663).

GE for all employees [97] and not substantially different from the quit rate of 33.3 per cent for women in California as reported in a study on turnover made by the Merchants and Manufacturers Association.[98]

In *Hanson* v. *Hutt,* Wash. Sup. Ct. No. 42326, decided December 29, 1973, the court, in holding unconstitutional the exclusion from Washington State's Unemployment Insurance Act of pregnant women as sex discrimination in violation of the equal protection clause, rejected the argument that women withdrew

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[97] The plaintiffs in the *Gilbert* case challenged the accuracy of those figures because the figures represented employees who did not return on the date fixed for their return by GE and did not include those who returned more than 8 weeks after childbirth. The plaintiffs by Interrogatories requested figures as to how many of the 1,147 who allegedly did not return were employed by GE subsequent to the birth of their child. Plaintiff's Fourth Interrogatories 63-66. GE in its answers to these interrogatories stated it was in the process of collecting data which would be supplied shortly but was in fact never supplied. The figures with respect to turnover quoted in the same footnote (GE Br. *amicus*, pp. 26-27, fn. 20) represent only a few isolated plants. In its objections to interrogatories (Plaintiffs Ex. 34) GE stated that its overall turnover rate was 40 percent.

[98] Merchants and Manufacturers Assn., Labor Turnover Handbook, 1970, p. 32; "The 1970 M&M Survey revealed that 65.6% (Table III) of the terminations reported were male and 34.4% were female, almost exactly the ratio of the total work force. The California labor force totalled 6,631,000 in 1969 with 4,199,000 males (63.32%) and 2,432,000 females (36.68%). It appears as if sex has little bearing upon the area occupational turnover. Specific industries were affected. However, combined with length of service, sex does indicate some interesting findings (Tables IV-A and IV-B). Approximately one third of the females left their jobs in each of the three periods studied. Men, on the other hand, had a higher rate (40%) in the first three months, and then a relatively lower period of turnover in the three months to one year period (27%)."

from the labor market upon becoming pregnant. The court stated:

> The Appellant has attempted to justify the statutory classification by asserting that pregnant women are not genuinely attached to the labor market. To the contrary, however, all five doctors who testified at the Commissioner's hearing concluded that 90 percent of pregnant women do not suffer from medical conditions that would impair their ability to continue working in their normal occupation. They also testified that most women can return to their jobs between 5 days and 4 weeks after delivery, the exact time depending on the individual woman. There is ample evidence to support the trial court's finding that pregnant women are attached to the labor market and that there is no medical basis in fact for their disqualification.

C. Practices of the Insurance Industry Are Irrelevant to the Issue of Whether Exclusion of Disabilities Arising From Pregnancy From an Otherwise All Inclusive State Temporary Disability Program Discriminates Because of Sex

The alleged practices of the insurance industry to exclude from temporary disability coverage pregnancy-related disabilities is relied upon by GE, *amicus* (Br., pp. 22-27) as demonstrating the rational purpose of California's exclusion. First, it should be pointed out that GE's expert witness, Actuary Paul H. Jackson, testified in the *Gilbert* trial that "most of the major companies will now offer the coverage" for a disability arising from pregnancy including benefits equal in amount and duration to those for any other disability (*Gilbert* Tr. 365). With reference to insurance policies which include as part of a temporary disability program income maintenance for a shorter duration than the period during which benefits for

other disabilities are available, Actuary Jackson estimated that approxiatemly 40 per cent of the existing temporary disability insurance policies provide such coverage (*Gilbert* Tr. 348). Another study containing figures for 1973 shows 64 per cent of workers covered by "paid sick leave" and 26 per cent of the total women workers in the United States covered by at least some "maternity leave with pay" [39] albeit usually for only six weeks.

Actuary Jackson, in his testimony in the *Gilbert* case, did not take the position that the disabilities attendent upon childbirth were not properly insurable risks (Tr. 365-366) but argued that they were more expensive because of the possibility of claim abuse, the ability to plan a pregnancy and the length of time women would be absent on account of pregnancy (see summary of his testimony, GE Br. *amicus*, pp. 25-26). In each respect he admitted he had no factual basis for his testimony. With respect to malingering he testified (*Gilbert* Tr. 358):

> Now there are many statistics that give evidence to the general fact of malingering as it affects disability income insurance in particular as a specific form of coverage.
>
> THE COURT: But not in reference to pregnancy?
>
> THE WITNESS: No.

With respect to duration, he again had no facts (*Gilbert* Tr. 381), but his personal conviction that all women would stay off for the maximum benefit period

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[39] Robert P. Quinn, Thomas W. Mangione and Martha S. Baldi de Mandelovitch, Evaluating working conditions in America, *Monthly Labor Review*, *Vol. 96*, No. 11, pp. 32, 37 (November 1973).

where covered by policies providing 13 weeks (Tr. 379-380, 387); would stay off 23 weeks under 26 week plans, and 30 weeks under 52 week plans (Tr. 387). He based this conclusion on what he described as "the natural tendency" of pregnant women to stay home prior to delivery "to make certain nothing goes wrong" and after delivery "to remain in the home with the child" (Tr. 359). Actuary Jackson relied on "my own personal experience * * * I have had perhaps a dozen secretaries have babies and leave" (Tr. 402).[100] He stated that the incentive of "furtherance of his career" by getting "back to work because he is competing with others" (*Gilbert* Tr. 352) does not apply to pregnancy-related disabilities (*Gilbert* Tr. 352-354).

These "subjective assumptions and traditional stereotyped misconceptions"[101] and "romantic paternalism"[102] have shaped women's exclusion from temporary disability benefits throughout the American experience. We have already mentioned GE's proud pioneering in 1925 with the introduction of temporary disability benefits in the American industrial scene,

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[100] The statement in GE's amicus brief (p. 25, fn. 19) that GE's experience with respect to the duration of disability leave for ordinary disability claims averaged two weeks and for maternity claims 15 weeks supports Actuary Jackson's testimony is misleading. GE's experience as to length of time women are off for pregnancy was the only specific data to which Jackson could point as the source of his conclusion as to duration of pregnancy leave (Tr. 391-392) and he was unaware either GE or other employers were often accountable for the early leaving date. He did not know about their mandatory leave rules (Tr. 391, 393). Also see pp. 88-89, *supra*).

[101] *Schultz* v. *First Victoria Natl. Bank*, 420 F.2d 648, 65[illegible] (5th Cir. 1969).

[102] *Weeks* v. *Southern Bell Tel. and Tel. Co.*, 408 F.2d 228, 23[illegible] (5th Cir. 1969).

when this "man-run company",[103] to use the words of its then president Gerard Swope, did not offer coverage to women on the theory "that women did not recognize the responsibilities of life, for they probably were hoping to get married soon and leave the company."[104]

Actuary Jackson portrays the insurance industry as having shaped its policies respecting disability insurance for women on the concept that women, rather than men, had family obligations which interfered with their attachment to their work. In *Martin Marietta* the employer's practices based on this same concept were found to constitute discrimination because of sex in violation of Title VII, *Phillip* v. *Marietta Corp.*, 400 U.S. 542 (1971), involving the refusal of a private employer to employ mothers of pre-school age children.

The discriminatory character of the pregnacy exclusion was recognized by Grant M. Osborn, *Compulsory Disability Insurance in the United States* (published for the S.S. Huebner Foundation for Insurance Education, 1958), p. 117:

> "To deny benefits in all cases of pregnancy constitutes discrimination against a significant group in the labor force. Many justify such action with the argument that female employees, even exclusive of pregnancy benefits, receive relatively larger share of benefits than do male employees.

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[103] Gerard Swope, *Management Cooperation with Workers for Economic Welfare*, The Annals of the American Academy of Political and Social Science, Vol. 154, pp. 131, 132 (March 1931).

[104] David Loth, *Swope of GE: Story of Gerard Swope and General Electric in American Business* (Simon Schuster, N.Y. 1958) p. 155; cf. Swope in the Annals, fn. 103, *supra*.

However, to carry this argument to its logical conclusion would justify reducing benefits to low-income and upper-age groups, who are in a similar position."

With respect to the assumption in the above quotation that females, even exclusive of pregnancy benefits, receive a relatively larger share of benefits than male employees, the studies show that when male and female employees are compared on the basis of age and wage rate, the women have as good and in some instances lower share of benefits. See brief for AFL-CIO as *amicus*, pp. 29-33.

Reliance upon the practices of the insurance industry serve to demonstrate that the exclusion is based on discrimination because of sex rather than any rational purpose. As the testimony of Actuary Jackson demonstrated, the only aspects of childbirth which made its coverage for disability benefits allegedly unduly expensive, were stereotyped concepts. The actual physical disability of a woman during childbirth does not differ materially from males disabled by accidents or ailments which require hospitalization, anesthesia, surgical incision, suturing and recovery. All of the differences, which Actuary Jackson insisted existed rested on his concept that a woman because of her mental attitudes about motherhood would behave differently from a man who had physical disabilities paralleling the physical disabilities of the female. Actuary Jackson thought it "only natural" that she will want to stay home before the baby is born to be sure her future child suffers no harm before it is born (*Gilbert* Tr. 359). Actuary Jackson also thought it was "natural" for her to want to stay home with the baby after it is born (*Gilbert* Tr. 359). All of his testimony describing the position of the insurance in-

dustry rested on supposition about the attitudes of women rather than on experience (pp. 107-108, *supra*).

In every respect such attempts to justify a different treatment for the disabilties of childbirth are based on the same reasoning as motivated *Martin-Marietta* in refusing to hire mothers of pre-school age children. The supposition that the pregnant woman will let her attitude towards motherhood keep her home from work when she is not disabled or that the employer may impose its notions of what is good for her and her baby, parallel those stereotypes respecting the hiring of mothers with pre-school age children which this Court held constituted unlawful sex discrimination in *Phillips* v. *Martin-Marietta Corp.*, 400 U.S. 542 (1971).

Practices of the insurance industry[105] based on stereotyped thinking about pregnant women and new mothers cannot serve to excuse state action irrationally based on the same stereotypes.

III. DENYING DISABILITY BENEFITS FOR DISABILITY DUE TO CHILDBIRTH WHEN DISABILITY BENEFITS ARE PAID FOR PRACTICALLY ALL OTHER DISABLING CONDITIONS CONSTITUTES DISCRIMINATION BECAUSE OF SEX WITHOUT ANY LEGITIMATE STATE INTEREST IN VIOLATION OF THE EQUAL PROTECTION CLAUSE

The court below held that "the exclusion of pregnancy-related disabilities is not based upon a classification having a rational and substantial relationship to a legitimate state purpose," and hence violated the

[105] See Susanne Stoiber, Insured except in Case of War, Suicide and Organs Peculiar to Females, Ms. June 1973, p. 114. In recent investigation of insurance practices, the discriminatory treatment of females by insurance companies was described in Hearings before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary of the United States Senate, 92nd Cong., 2d Sess., pp. 5-6, 93-99.

equal protection clause. The court pointed out that (App. A, p. 9):

> Pregnancy is clearly a unique human condition: only pregnancy can result in the birth of a child. For a woman, however, the effects of pregnancy and pregnancy-related illness are debilitating in much the same way as the physical and mental conditions that are included within the scope of the disability insurance program.

The only other case holding that state action which denied sick pay to a woman disabled by pregnancy, violated the equal protection clause is *Bravo* v. *Board of Education of Chicago,* 345 F.Supp. 155, 159, 4 FEP Cases 994, 997-998 (N.D. Ill. 1972). That case involved denial by a school board of such pay to teachers. The court stated (345 F.Supp. at 159):

> Teachers on illness leave are allowed to draw pay for their accrued "sick pay" days; pregnant teachers are not. * * * The Board has offered no reason for these differences in benefits between teachers who are ill and those who are pregnant. * * * For purposes of sick pay, * * * the Board will be further directed to treat maternity leaves as leaves due to illness.

In *Wetzel* v. *Liberty Mutual Ins. Co.,* 7 FEP Cases 34 (USDC WDPa. 1974), holding that exclusion of pregnancy-related disabilities from temporary disability benefits violates Title VII, the Court followed and quoted the court below.

Similarly, in *Dessenberg* v. *American Metal Forming Co.,* (USDCND Oh.ED), Case No. C-72-487, Judge William J. Young on October 9, 1973, held that the prohibition on discrimination in employment because of sex contained in Title VII required that

women disabled by pregnancy be provided with "sick pay to the same extent that sick pay is provided for other temporary disabilities."

In *Goodyear Tire & Rubber Co.* v. *Local Union No. 200, United Rubber Workers,* 6 FEP Cases 1069 (Ct. of Common Pleas of Auglaize County, Ohio 1973), the court in enforcing an arbitration award, held that the arbitrator had properly applied Title VII to require the employer to eliminate the six weeks limitation on sick pay for pregnancy-related disabilities where sick pay was payable for 52 weeks for other disabilities.

The singling out of pregnant women for exclusion from unemployment insurance benefits has recently been held to constitute a "classification based on sex" without a "compelling state interest" and hence violative of the equal protection clause. *Hansen* v. *Hutt,* DLR 1/9/74 (No. 6), p. A-8 (Wash. Sup. Ct. No. 42826). Accord: *Vick* v. *Texas Employment Comm.,* 6 FEP Cases 411, 413 (USDCTex. 1973) "such a natural and necessary female condition cannot be the basis for categorical discrimination in light of *Phillips*"; *Jordan* v. *Meskill* (USDCConn., Civ. Act. No. 15,671, order of Judge Robert C. Zampani, June 26, 1973); *Orner* v. *Bd. of Appeals, Employment Security Administration,* 5 CCH Unemployment Ins. Reporter, Md. ¶ 8387, p. 23,544 (Superior Ct. of Baltimore City, Case No. 132592, 1973) no "compelling reason to treat pregnancy in a different manner from any other temporary disability common to both men and women".

In numerous of the cases involving mandatory leaves for teachers the courts placed their ruling on the ground, as stated by Judge Merhige in *Cohen* v. *Ches-*

terfield County School Bd., 326 F.Supp. 1159, 3 FEP Cases 526, 528 (E.D.Va. 1972), *rev'd.* 474 F.2d 395 (4th Cir. 1973), *rev'd* in opinion in *Cleveland Bd. of Ed.* v. *LaFleur*, Nos. 72-777 and 72-1129 this term, decided January 21, 1974:

> Because pregnancy, though unique to women, is like other medical conditions, the failure to treat it as such amounts to discrimination which is without rational basis, and therefore is violative of the equal protection clause of the Fourteenth Amendment.

Accord: *Green* v. *Waterford School Board*, 473 F.2d 629 (2nd Cir. 1973); *Buckley* v. *Coyle Public School System*, 476 F.2d 92, 5 FEP Cases 773 (10th Cir. 1973); *Bravo* v. *Board of Education of City of Chicago*, 345 F.Supp. 155 (N.D. Ill. 1972); *Health* v. *Westerville Board of Education*, 345 F.Supp. 501, 505 (S.D. Ohio 1972); *Williams* v. *San Francisco Unified School District*, 340 F.Supp. 438, 443; *Pocklington* v. *Duval County School Board*, 345 F.Supp. 163 (N.D. Fla. 1972); *Cerro* v. *East Stroudsburg Area School District*, 299 A.2d 277, 5 FEP Cases 480 (Pa. Sup. Ct. 1973).

The foregoing cases have uniformly rejected the same arguments as are advanced here by appellant and *amici* supporting appellant that there are unique aspects attendant upon pregnancy which require different treatment.

In the instant case, due to the fact that the State of California has now by judicial decision and amendment of the law, decided to pay disability benefits for all abnormal pregnancies or complications of pregnancy, the issue here is even narrower. Is there any

state interest which justifies singling out periods of disability due to the normal delivery of a baby, and recovery therefrom, from all other periods of disability for the purpose of denying disability benefits during that period?

The essence of the argument of appellant and *amici* supporting appellant is that there are differences between absences resulting from normal childbirth and other absences due to a disabling condition which establish that the different treatment does not constitute discrimination because of sex. We have shown above that none of the alleged differences are relevant to the purposes of the State of California in providing temporary disability benefits. In all respects the woman disabled by childbirth is just as much, if not more, in need of the benefits as any person disabled by any other condition. The nature of the disability is in no way relevant to the need. Her loss of the usual income from her job as a result of a physical disability differs in no wise from the loss of income of any male disabled by a condition, peculiar to males, who draws benefits. The attempts of appellant and *amici* to establish that we must look beyond the comparison of actual physical condition and rely on assumed difficulties with disability benefits for childbirth such as claim abuse, malingering, failure to return after childbirth, all invoke stereotypes to predict women as a group behave differently with respect to a disability from childbirth than men behave respecting any accident or ailment involving similar hospitalization, anesthesia, surgical incision, suture and recovery. The assumption mothers-to-be and new mothers will be less attached to their jobs than males, constitutes exactly the same type of sex discrimination as was present respecting mothers

of pre-school age children in *Phillips* v. *Martin-Marietta Corp.*, 400 U.S. 542 (1971).

The imposition on the welfare system which results from the failure to provide benefits during periods of disability from childbirth is the same as that which would be imposed on the welfare system but for the payment of benefits for other disabling conditions.

Where males and females are treated differently with respect to aspects of their employment, without any relevant basis for the difference, sex discrimination is present.

The only state interest is in the avoidance of cost. As we have demonstrated (pp. 87-100, *supra*), the cost of including disabilities arising from normal childbirth would appear to be only a minor fraction of the figures advanced by appellant and *amici*. But even assuming the cost figures suggested, the decisions of this Court hold that cost alone cannot save state action discriminating because of sex from the interdiction of the equal protection clause. *Reed* v. *Reed*, 404 U.S. 71 (1971); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). Compare *Shapiro* v. *Thompson*, 394 U.S. 618, 633 (1969); *Memorial Hospital* v. *Maricopa County*, 42 U.S.L.W. 4277, 4281 (February 26, 1974).

CONCLUSION

For the foregoing reasons, it is respectfully urged that the judgment below should be affirmed.

Respectfully submitted,

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March 11, 1974

No. 73-640

In the Supreme Court of the United States

DWIGHT GEDULDIG, APPELLANT,

v.

CAROLYN AIELLO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, APPELLEES

DWIGHT GEDULDIG, APPELLANT,

v.

AUGUSTINA D. ARMENDARIZ, ELIZABETH B. JOHNSON, JACQUELINE JARMILLO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, APPELLEES

CONSOLIDATED CASES ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE

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No. 73-640

In the Supreme Court of the United States

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CONSOLIDATED CASES ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE

STATEMENT OF INTEREST

The issue in this case is whether a state law, providing disability insurance for all workers for almost every disability except the period of disability arising from normal pregnancy, discriminates against women

in violation of the Fourteenth Amendment. The resolution of this issue will have a significant bearing on the implementation of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. (Supp. II) §§ 2000e *et seq.*, which prohibits discrimination on the basis of sex with respect to the terms and conditions of employment in both the private and public sectors. The Guidelines of the Equal Employment Opportunity Commission (29 C.F.R. 1604.10 (1972)), the agency charged with the enforcement of Title VII, prohibit the disparate treatment of pregnancy disabilities in the employment context as violative of Title VII. A number of law suits are presently pending in which the disparate treatment of pregnancy disability by private employers has been challenged, and in which the employers are attacking the validity of the Commission Guidelines. The decision in this case will influence the decisions in the cases under Title VII since, although the standards for determining unlawful discrimination are not precisely the same under Title VII and the Fourteenth Amendment, they are in many ways analogous.

OPINIONS BELOW

The majority and dissenting opinions of the three judge court below are reported at 359 F. Supp. 792. The denial of rehearing (App. 54–55) is not reported.

JURISDICTION

The judgment of the three judge court was entered June 15, 1973. Rehearing was denied on August 7, 1973. The notice of appeal was filed August 13, 1973.

The jurisdiction of this Court is conferred by 28 U.S.C. § 1253.

STATUTE INVOLVED

California Unemployment Insurance Code, section 2626 (Stats. 1953, c. 308 p. 1531), at the time of the commencement of this action read as follows:

> "Disability" or "disabled" includes both mental or physical illness and mental or physical injury. An individual shall be deemed disabled in any day which, because of his physical or mental condition, he is unable to perform his regular or customary work. In no case shall the term "disability" or "disabled" include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter.[1]

Effective January 1, 1974, the statute was amended and a new § 2626.2 added (Stats. 1973, c. 1026):

> "Disability" or "disabled" includes both mental or physical illness, mental or physical injury, and, to the extent specified in Section 2626.2, pregnancy. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work.

[1] The only other persons who cannot recover under the statute are those individuals who have been institutionalized as dipsomaniacs, drug addicts or sexual psychopaths. § 2678 provides:

> An individual shall be disqualified from receiving benefits under this part while he is confined, pursuant to commitment or Court order or certification, in an institution or other place, as a dipsomaniac, drug addict or sexual psychopath.

[Section 2626.2]

Benefits relating to pregnancy shall be paid under this part only in accordance with the following:

(a) Disability benefits shall be paid upon a doctor's certification that the claimant is disabled because of an abnormal and involuntary complication of pregnancy, including but not limited to: puerperal infection, eclampsia, caesarean section delivery, ectopic pregnancy, and toxemia.

(b) Disability benefits shall be paid upon a doctor's certification that a condition possibly arising out of pregnancy would disable the claimant without regard to the pregnancy including but not limited to: anemia, diabetes, embolism, heart disease, hypertension, phlebitis, phlebothrombosis, pyelonephritis, thrombophlebitis, vaginitis, varicose veins, and venous thrombosis.

QUESTION PRESENTED

Whether § 2626 of the California Unemployment Insurance Code, which grants disability benefits for nearly every disability, violates the Equal Protection Clause of the Fourteenth Amendment by denying the same benefits to those women unable to work because of pregnancy-related disabilities.

STATEMENT

The State of California has a disability insurance program described in detail in the opinion below (*Aiello* v. *Hansen*, 359 F. Supp. at p. 794) which is supported by employee contributions, presently fixed at 1% of salary up to a maximum of $85 per year.

Beyond the special treatment of pregnancy, involved in this action, the statute provides coverage up to 26 weeks for all disabilities except for persons institutionalized as dipsomaniacs, drug addicts or sexual psychopaths.

At the time of the commencement of this action, the statute excluded from benefits all pregnancy-related disabilities for a period of 28 days after termination of pregnancy. This action sought to enjoin enforcement of that provision and to require payment of benefits to women with pregnancy-related disabilities. A three judge court held that the law was discriminatory since the effect of pregnancy-related disabilities could not constitutionally be excluded solely because of the additional cost. Judge Williams dissented, finding that the challenged provision was not arbitrary and was rationally related to a State interest.

The statute has been amended, effective January 1, 1974, to cover pregnancy-related disabilities arising from abnormal pregnancies. The question now before the Court, therefore, is whether the statute unconstitutionally discriminates against women by excluding from coverage that period of disability which arises from a normal pregnancy.

SUMMARY OF ARGUMENT

In the employment context a pregnancy-related disability is the same as a disability resulting from any other mental or physical condition. To treat pregnancy-related disabilities differently from other disabilities by excluding them as a basis for disability

insurance benefits is sex discrimination in violation of both the Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964. The State of California cannot sustain a defense to such discrimination on the basis of the alleged prohibitive cost involved in covering pregnancy-related disabilities under either the standard of strict scrutiny or that of rational relation.

ARGUMENT

I

THE EXCLUSION FROM BENEFITS OF THE PERIOD OF DISABILITY DUE TO PREGNANCY, WHILE PAYING BENEFITS FOR ALL OTHER FORMS OF DISABILITY, CONSTITUTES DISCRIMINATION BASED ON SEX

The purpose of the California program, as with disability insurance generally, is to cushion the economic effects of loss of income and incurrence of medical expenses which arise from physical inability to work. In relation to that purpose, the effect of pregnancy in the employment context is no different from the effects of any other disability, be it a heart attack or a skiing accident. For a period of time, varying from individual to individual, but usually for a period shortly before the birth of the child until about four to six weeks thereafter, the pregnant woman is physically unable to carry on her normal work. She therefore suffers the loss of income resulting from inability to work. At the same time, she almost always incurs the medical expenses attendant on the delivery of the child and the care required thereafter. Whether or

not pregnancy is deemed a normal biological condition, rather than an illness or an injury, it clearly is, in the employment context, a disability no different in kind from any other disability in relation to the inability of the woman involved to carry on her normal work and earn her normal wages.[3]

Under the California statute nearly all disabilities—including voluntary cosmetic surgery, non-institutionalized alcoholism, injuries resulting from drunken driving or driving under the influence of drugs, and injuries received in an attempted suicide—are covered and a person so disabled can collect benefits from the fund.

Only the period of disability resulting from pregnancy is not covered. Pregnancy is, of course, a condition peculiar to women. When, therefore, the State covers in its insurance plan all disabilities, voluntary or involuntary, to which a worker may be subject, except the one disability peculiar to women, it is inevitably discriminating against women because of their sex. This becomes clear when a different situation is considered. If an insurance policy covered every disability except that arising from sickle cell anemia, a disease with particularly high incidence among blacks, such a policy, although neutral on its face, would re-

[3] Pregnancy-related disability shares the same characteristics as other disabilities: loss of income, medical expenses, hospitalization, and possible death. *See* Childbirth and Child Rearing Leave: Job-Related Benefits, Elizabeth Duncan Koontz, Dir., Women's Bureau, U.S. Department of Labor, 14 *N.Y. Law Forum* 480, 483 (1971). *See also* Grubb and McCoy, *Love's Labors Lost: New Conceptions of Maternity Leaves*, 7 Harv. Civ. Rights-Civ. Lib. L. Rev. 260 (1971).

sult in disparate treatment of blacks. Whether that policy could or could not be justified on the basis of other considerations would be a matter to be determined under appropriate standards. But even if found valid, this would not alter the fact that the plan did single out blacks for separate treatment. So here, a program which covers every form of disability, voluntary or involuntary, but does not cover pregnancy, treats women differently because of their sex. That difference in treatment may or may not be justified—a matter we discuss *infra*. It is, however, important, for the purposes of proper analysis, to recognize that the singling out of pregnancy as a basis for denying benefits does amount to sex discrimination *per se*.

The recognition that the denial of benefits for a disability peculiar to women amounts to sex discrimination is the basis of the E.E.O.C. guidelines on this subject. Those Guidelines, "Employment Policies Relating to Pregnancy and Childbirth," 29 C.F.R. 1604.10, 37 F.R. 6835 (1972) provide:

> Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of sick leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and pa-

ment under any health or temporary disability insurance or sick leave plan, formal or informal shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

The brief of *Amicus*, General Electric, argues that since the Guidelines were not issued until 1972, when Title VII was enacted in 1965, the Guidelines should not carry any significant weight. This contention ignores the fact that the Guidelines evolved as perceptions of what constituted employment discrimination altered when various specific problems received closer attention. Both the Congress [3] and the Courts [4] have

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[3] *See* remarks of Senator Williams contained in the Senate Committee Report to the Equal Employment Opportunity Act of 1972 amending the 1964 Act:

In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization . . . Experience has shown this view to be false. Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of systems and effects rather than simply intentional wrongs . . .

In short, the problem is one whose resolution in many instances requires not only expert assistance, but also the technical perception that the problem exists in the first instance, and that the system complained of is unlawful. (Emphasis supplied). (Senate Report No. 92-415, ~~Calendar No. 412, p. 5~~). 92d Cong., 1st Sess., p. 5).

[4] *See Rogers v. EEOC*, 454 F. 2d 234, 238 (5th Cir. 1971, *cert. denied*, 406 U.S. 959):

"Time was when employment discrimination tended to be viewed as a series of isolated and distinguishable events, manifesting itself, for example, in an employer's practices of hiring, firing, and promoting. But today employment discrimination is a far more complex and pervasive phenomenon, as the nu-

recognized this to be the case. The Commission carefully scrutinized both employer practices and their crucial impact on women for a substantial period of time and then issued its Guidelines after it became increasingly apparent that systematic and pervasive discrimination against women was frequently found in employers' denial of employment opportunity and benefits to women on the basis of the childbearing role, performed solely by women. The fact that the Commission did not issue its Guidelines immediately cannot abrogate those rights already enforceable under the Act. *Bartmess v. Drewrys U.S.A., Inc.*, 444 F.2d 1186 (7th Cir.), *cert. denied sub. nom. Drewrys Limited U.S.A., Inc., v. Bartmess*, 404 U.S. 939 (1971).

None of the considerations offered by the State as a basis for singling out pregnancy related disabilities for denial of benefits serves to counter the position that such singling out is sex discrimination. All the alleged justifications offered by the State—the alleged voluntariness of the pregnancy state, the ability to anticipate the period of disability, the alleged failure of a large portion of the women to return to the job market—do not alter the fact that, in its relation to employment, the disability due to pregnancy is not different in kind from the disability due to any other

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ances and subtleties of discriminatory employment practices are no longer confined to bread and butter issues."

" . . . [T]he modern employee makes ever-increasing demands in the nature of intangible fringe benefits. Recognizing the importance of these benefits, we should neither ignore their need for protection, nor blind ourselves to their potential misuse."

physical inability to work. None of the justifications alleged are peculiar to pregnancy alone.

The State argues that pregnancy is voluntary[1] and therefore, unemployment due to pregnancy is voluntary and not a proper basis for disability insurance. It is the Commission's position that, while in some instances the timing of pregnancy may be voluntary, pregnancy *per se*—the procreation of the species—is not. As stated in *Skinner* v. *Oklahoma*, 316 U.S. 535, 541:

> We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.

As Judge Weber recently said in *Wetzel* v. *Liberty Mutual Insurance Co.*, 7 EPD ¶ 9097 (W.D. Pa. 1974):

> Because pregnancy is a natural, expectable, and societally necessary condition, which is certain to occur in a statistically predictable number of women in the labor force, we see no merit in . . . [the] argument that it may be excluded

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[1] Pregnancy itself is many times not voluntary both because of a couple's religious convictions and because there is not at this time a completely certain method of contraception. Further, many women, for health reasons, cannot use either "the pill" or an IUD.

Amicus, General Electric, on p. 8 of its brief, argues that abortion is a means of avoiding pregnancy. Clearly this is not true. Abortion terminates a pregnancy; it does not stop one from occurring. What the *Amicus* seems to be implying is that a disability program should pay for the termination of a pregnancy and, because of this option, forces a woman to choose between motherhood and employment. This would be unconstitutional. *Skinner* v. *Oklahoma*, 316 U.S. 535, 541.

from equality of treatment in conditions and benefits of employment because it is a voluntary condition. Whether voluntary or not, it occurs with certainty and regularity.

Further, the statute does not treat all allegedly voluntary disabilities equally. Many periods of disability, including operations for cosmetic surgery, are wholly voluntary. Others, such as conditions caused by drinking or smoking or accidents caused by skiing, are voluntary in the sense that the choice of life style gives rise to the disability. Even if pregnancy be considered voluntary, the State discriminates against women by covering some voluntary disabilities but not those peculiar to women. Similarly the argument that pregnancy should not be covered because it may be anticipated does not render the policy non-discriminatory. Not every pregnancy is planned. Moreover, planned or not, this is not a condition peculiar to pregnancy. Many operations, even if not voluntary, can be anticipated and planned for in advance.

Nor is it inherent in pregnancy disability that the woman will not return to the work force. By the State's own figures, 50% do return. Moreover, other conditions, whether they result in death or permanent disability, result in the removal of the worker from the work force. Thus the plan is not geared to return to the work force.

The incidence of these various considerations may or may not be greater with respect to pregnancy and may or may not be justification for disparate treatment of pregnancy-related disabilities. It is, however, important, in considering the legal effect of such

alleged justifications, to realize that they are just that—attempted justifications for sex discrimination. They are not considerations which refute the concept that the singling out of pregnancy disability for denial of benefits is discrimination based on sex. A woman who cannot work because of pregnancy loses her earnings and incurs expenses just as much as anyone who cannot work because of some other physical injury.[8] To treat her disability differently than others is discrimination based on sex.

II

THE STATE HAS OFFERED NO VALID JUSTIFICATION FOR THE SEX DISCRIMINATION INVOLVED IN DENYING BENEFITS TO WOMEN FOR DISABILITY CAUSED BY PREGNANCY

Once it is recognized that the pregnancy exclusion does amount to discrimination against women, the arguments offered by the State and by those filing briefs in its behalf can be evaluated in their true light—as justifications for discrimination. Under established law one of two standards would apply. If sex is deemed a suspect classification—as we think it should be for the reasons articulated by four justices in *Frontiero v. Richardson*, 411 U.S. 677, then the dis-

[8] Nearly two-thirds of all women who work do so because they must—either they are alone or their husbands earn less than $7,000 a year. United States Department of Labor, Women's Bureau, *Why Women Work* (rev. ed. 1972). A publication of the United States Department of Labor, Employment Standards Administration, April, 1973, entitled *The Myth and the Reality*, shows the ties between working women and today's labor market.

crimination is subject to strict scrutiny and can be justified only by showing a compelling state interest. As this court recently stated in *Sugarman v. Dougall*, ___ U.S. ___, 93 S. Ct. Reptr. 2842, in order to justify a suspect classification, the State has the burden of showing that "its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary to the accomplishment' of its purpose or the safeguarding of its interest". The State in this case has not met that burden.

A less stringent standard was that applied in *Reed v. Reed*, 404 U.S. 71, 76. "A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. . . ." The Court below correctly interpreted *Reed*[7] as holding that classifications which are based on stereotypes rather than reason are to be rejected.[8]

The State is stereotyping pregnant women and not judging them on an individual basis. "Discrimination is not to be tolerated under the guise of physical properties possessed by one sex." *Sprogis v. United Airlines, Inc.*, 444 F.2d 1194, 1198. (7th Cir.) *cert. denied*, 404 U.S. 991. *See Heath v. Westerville Bd. of Education*, 345 F. Supp. 401 (S.D. Ohio). Not only

[7] The District Court adopted reasoning enunciated in *Green v. Waterford Bd. of Education*, 473 F. 2d 629, 633 (2d Cir. 1973) "that *Reed* is probably only one of several cases that mark a general shift in the "rational basis" test to a standard 'slightly, but perceptively, more vigorous.'" 359 F. Supp. at p. 706.

[8] *See Stanley v. Illinois*, 405 U.S. 645 and *Heath v. Westerville Bd. of Education*, 345 F. Supp. 501 (S.D. Ohio 1972).

does the State stereotype pregnancy, but it generalizes on the length and severity of pregnancy-related disabilities, and labels all new mothers as malingerers.*

A. NONE OF THE NON-FINANCIAL CONSIDERATIONS OFFERED BY THE STATE JUSTIFY THE DISCRIMINATION AGAINST WOMEN RESULTING FROM THE DENIAL OF BENEFITS DURING A PERIOD OF DISABILITY CAUSED BY PREGNANCY

The State offers a number of considerations which it claims justify the disparate treatment of women resulting from the exclusion of benefits for the period of disability due to pregnancy. None of these justify the discrimination involved, even under the lesser standard of *Reed v. Reed, supra.*

1. As discussed above, pregnancy-related disability is no different from any other disability so far as it relates to the objectives of a disability insurance pro-

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*Under Title VII, there are two justifications for sex discrimination. One is the statutorily created test of bona fide occupational qualification, which does not apply here. The other is the judicially created defense of business necessity. The employer has the burden showing that the challenged practice is essential to the safety or efficiency of its operation. *Head v. Timken Roller Bearing Co.*, 486 F.2d 870 (6th Cir.); *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2nd Cir.); *Local 189, United Papermakers & Paper Workers v. U.S.*, 416 F.2d 980 (5th Cir.). As stated in *Robinson v. Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir.) ". . . The challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential . . . ." (emphasis added.) The justification for discrimination under this standard would be even stricter than under the Fourteenth Amendment.

gram to compensate for the loss of earnings and medical expenses incurred during such period. For those women who work because they must—the majority of working women—the period of disability due to pregnancy represents a period of economic need as great, if not greater, than any other period of disability for men and women.

2. For the reasons discussed above, pregnancy cannot be deemed voluntary. Moreover, the California system does not make a distinction between voluntary and involuntary disability. A system which pays for all voluntary disabilities, including cosmetic surgery, cannot justify discrimination against women because the period of disability can be said to have elements of voluntariness.

3. The fact that, even if involuntary, the period of disability can be anticipated and planned for is not a valid reason to discriminate against women. Many conditions which require surgery, including conditions peculiar to men such as a prostate operation, can be planned for in advance.

4. The State claims (Ap. Br, 20) that it is proper to distinguish pregnancy-related disabilities from other disabilities because such claims will tend to be for periods longer than the actual inability to work. There is, however, no assertion by plaintiffs in this action that the State is under any obligation to pay for a period beyond that of actual disability. The fact that some women may attempt to get benefits to which they are not entitled is hardly a reason to deny benefits to those women to whom they are legitimately due. Cali-

fornia states that the claims for disability due to pregnancy have been averaging 15 weeks since the decision below. A claim does not necessarily mean a grant of benefits. If there is a problem with claims that go beyond the period of disability, the problem should be handled directly, by making clear to the doctors of California that certifications of disability must be based on actual physical disability, and not on other considerations. Certainly, as the District Court found, the implication of the State's argument—that pregnant women have a greater tendency to malinger—is without any basis in fact. As the district court said in *Wetzel v. Liberty Mutual Ins. Co.*, No. 72-169, (W.D. Pa.) Memorandum Order of February 20, 1974:

> The court cannot understand why the disability from performing work due to pregnancy or childbirth cannot be medically determined in the same way that disability from performing work is medically determined in all other disability cases. As a trial judge who has seen hundreds of cases of soft tissue damage arising from the so-called "whip lash" type of injuries which produce few observable symptoms the Court sees no basis for assigning the tendency to malinger as a sex-related characteristic.

5. The State argues that pregnancy is legitimately excluded from its disability program, which is related to the work force, because 50% of working women do not return to work after the birth of a child. But the fact that some women do not return to the work

force as soon as they are physically able to do so[10] is not a valid reason for denying benefits to those who do return as soon as they can, most of them because they need the money. As with exaggerated claims, the way to handle the problem, if indeed it is a problem, is to attack it directly. The State could, if it deemed it desirable, adopt some plan which would make certain that those who do not return to the work force would not be compensated. It should be noted in this connection that the State has no provision for withholding benefits from anyone who does not return to the workforce. Permanent disability and death prevent other workers from returning to the work force. Disability benefits are not denied to such persons.

6. The State also claims that benefits for pregnancy may legitimately be denied because women as a group already receive more money from the disability fund than they contribute. The reason women receive more than they contribute arises largely from the fact that they earn less than men.[11] In any event, as the court below pointed out, the state system is not operated on an actuarial basis. A policy which is discriminatory against some women on account of their sex cannot be justified on the ground that it is not discriminatory against all women. *Phillips* v. *Martin-Marietta Corp.*, 400 U.S. 542.

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[10] As noted in the brief of Appellees (pp. 71–76) an increasingly large percentage of women do return to the workforce after a more extended period of absence.

[11] *See Sail'er Inn, Inc.* v. *Kirby*, 485 P.2d 529, 541 n. 19 which quotes the study of the President's Task Force on Women as to the lower earnings of women.

B. INCREASED COST IS NOT A VALID JUSTIFICATION FOR DISCRIMINATION: ANY FINANCIAL PROBLEMS THAT MAY ARISE CAN BE DEALT WITH IN A NON-DISCRIMINATORY FASHION

The main justification for excluding disability due to pregnancy, advanced by the State and *Amici*, is the increased cost of including pregnancy-related disability in the program. In our view, the cost factor has been greatly exaggerated. Moreover, if it should prove to be a problem, it could be handled in ways that do not discriminate against one group of women. Since, as we have shown, the exclusion of pregnancy-related disability from the State's program is discriminatory, the State has the burden of proving, by facts, and not by speculation, that the cost is so overwhelming that it justifies the discrimination. This it has not and cannot do.

1. Much of the State's speculation as to increased costs is based on its assumptions that women will obtain benefits for periods beyond the period of actual disability. This immediately casts doubt on its estimate of costs.

A recent study indicates that, if disability benefits for pregnancy are limited to the period of actual physical disability, the impact on overall costs would not be great. Greenwald, "Maternity Leave Policy," *New England Economic Review*, January/February 1973. The article addresses itself to the question of the increase in labor costs of the Federal Reserve Bank of Boston had it followed the Commission Guidelines and paid its female employees sick leave and disability benefits during disability due to preg-

nancy. The period studied was from January 1971 to August 1972. Approximately 30% of the Bank's employees during this time were women under the age of 34. Bank employees accumulated sick leave at the rate of 18 full-pay and 18 half-pay days a year, and could accumulate up to 270 full-pay days. Ms. Greenwald used 2 hypotheticals in her study. In Case A, the woman works through her eighth month of pregnancy and then takes leave amounting to 10 weeks. In Case B, the woman uses all her accumulated sick pay—approximately 14–16 weeks.

The study concluded that in Case B the hourly wage costs would have risen 1.2% (4 cents) in 1971 and 0.6% (2 cents) in 1972. In Case A the increase would have amounted to approximately half as much. Ms. Greenwald determined that total labor costs—the labor cost of all employees per worker hour—would have risen 1 cent in 1971 under B and ½ cent per hour under A. In 1972 the increased costs would have amounted to approximately ½ the costs incurred in 1971.

The Greenwald study also reviewed the actual costs incurred by the Bank for sick pay and disability benefits and concluded:

> For men under 35, the costs were 9 cents an hour in 1971, and 8 cents an hour in 1972. For women under 35, these actual medical costs were 10 cents an hour in both years. After liberalizing benefits to include paid maternity leaves, . . . , hourly costs for women under age 35 would have risen in 1971 to 12 cents an hour under assumption A and to 13 cents an hour

under assumption B. Even in Case B, the cost of these medical payments to women under age 35 would still be less than that to women over 35 and to men over age 55.

2. Even on the State's assumption that benefits will average 13 to 15 weeks, the costs would not disrupt the system. As the District Court noted (App. 11) using the State's own figures, the increased cost could be covered by increasing the contribution rate from one percent to 1.364 percent and by raising the ceiling from $85 to $119.

The California experience under the statute shows that in purpose and practice the disability insurance program has shown itself to be flexible and able to deal with any additional cost involved in including pregnancy related disabilities.[11]

The State did a study of the disability insurance program covering the ten year period from 1956–1965. "Final Report of the Joint Committee on Unemployment Compensation Disability Insurance", Joint Committee on Unemployment Compensation Disability Insurance, Assembly Concurrent Resolution 45 (1965). During the majority of the 10 years the State paid out more than it received. At one point, however, the

[11] It is important to remember, especially in the cost context, that if an employee is being paid his regular pay while disabled, he cannot collect disability pay. Therefore, it follows that any alleged financial burden on the State will be greatly diminished when employers adhere to Title VII and treat pregnancy-related disabilities the same as other disabilities by allowing women to use accumulated sick leave and possibly annual leave as well.

Fund had $141.6 million—more than 2.5 times the total disbursements for that particular year. In order to reduce this amount the State did a number of things: (1) it gave higher benefits to people drawing at less than the maximum rate; (2) it increased hospital coverage from 12 to 20 days for each period of disability; and (3) it raised the additional benefit given to people who were hospitalized from $10 to $12 a day. A number of years thereafter the Fund was faced with the opposite problem and did two things to balance itself. It transferred $70 million from the unemployment fund to the disability insurance fund and it raised the taxable wage base. In 1965 the State again raised the wage base and for the period of August 1, 1965–December 31, 1965 raised the employee contribution rate from 1% to 1.1%. That same year, based on a history of the Department of Employment's borrowing of money to tide the fund over, the legislature passed legislation to refinance the program.

The above examples of flexibility on the part of the State to cope with the changing needs of both the Fund and disabled employees points up very clearly that the system could be made to cope, without discrimination, with any change in the distribution of disability benefits.[12]

The Joint Interim Committee Report states (p. 28):

> The flat-rate contribution principle leads inevitably to the pooled fund, for all practical

[12] One area that might be open to change, since it remained the same from the date of the enactment through the time of the Report, is the basic monetary eligibility requirement.

purposes. Groups of employees, no matter how classified, will vary somewhat from one another in their cost rates. The flat-rate contribution collects more than is needed from some groups of employees in order to pay more to other groups of employees than is contributed by them. This principle, with minor modifications, is deeply embedded in the California system. Its abandonment would require a radical revision of the present financing structure. There appears to be little reason to believe that such a revision is supported by a major proportion of either employers or their employees.

3. There are no doubt other ways in which the State could adjust its insurance program to meet whatever increased costs it experiences. But whatever means it chooses to utilize, the system should operate fairly in favor of all persons similarly situated. As we have repeatedly stressed, pregnancy as a disability is not different from other disabilities, voluntary or involuntary. If the State can show a real, factual justification for treating differently certain types of disability, whether they occur in males or females, which share the same characteristics, a far different question would be presented than the one before this Court. There is no reason why a disability resulting from pregnancy, a disability limited to women, should be singled out for special treatment. To do so is to discriminate against women because of their sex in violation of Title VII and the Fourteenth Amendment.

CONCLUSION

For the reasons stated the judgment below should be affirmed.

Respectfully submitted.

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*In place of the Solicitor General, who is disqualified in this case.

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No. 73-640

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Appellant,

v.

CAROLYN AIELLO, individually and on behalf of all others similarly situated,

Appellees.

DWIGHT GEDULDIG,

Appellant,

v.

AUGUSTINA D. ARMENDARIZ, ELIZABETH B. JOHNSON, JACQUELINE JARAMILLO, individually and on behalf of all other women similarly situated,

Appellees.

CONSOLIDATED CASES ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Reply Brief for Appellant

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Reply Brief for Appellant

Appellees argue that pregnancy is the *essence* of femaleness.[1] Therefore, unless pregnancy is compensated as a

1. Appellees Brief at 32, n. 25: "The physical characteristic which is most pervasively used to differentiate the legal status of men and women is the capacity of women to become pregnant."

temporary disability, California is guilty of sex discrimination and pregnant women are denied equal protection of the laws. In light of recent litigation in this area, this Court may well have a sense that motherhood involves neither a pedestal nor a cage but a Procrustean bed upon which pregnancy is alternately not a disabling condition,[2] and a frequently fatal affliction.[3]

Appellees do a disservice to women when they make pregnancy the *sine qua non* of being woman. Surely it is common observation that a large part of woman's struggle for equality involves gaining social acceptance for roles alternative to childbearing and childrearing, and to place on equal footing the woman who, through choice or chance, is childless. Childbearing capacity is not an essential or universal or lifelong female trait. But it is a common occurrence among women of childbearing age and it is the subject of statutory regulation in a variety of contexts. In light of the flood of litigation generated by these laws,[4] it is appropriate for this Court to reiterate its conclusion in *Cleveland Board of Education v. LaFleur*,[5] that in challenges to pregnancy regulations, the judicial process necessarily proceeds from an analysis of the rational relationship of the rule to a valid state interest.

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2. Brief for Petitioner on Writ of Certiorari in *Cohen v. Chesterfield County School Board*, No. 72-1129 (January 21, 1974), 19, especially footnote 10.

3. Appellees' Brief at 62-64; Brief Amicus Curiae of International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC ("IUE" hereinafter) at 48-49.

4. See Appellees' Brief at 29, n. 22 for a listing of some of these cases.

5. Decided together with *Cohen v. Chesterfield County School Board*, ... U.S. ....., 94 S.Ct. 791, 798 (1974) (hereinafter cited as *La Fleur*).

I.

THE EXCLUSION OF BENEFITS FOR NORMAL PREGNANCY UNDER THE CALIFORNIA UNEMPLOYMENT INSURANCE CODE IS THE RESULT OF A CONSCIOUS LEGISLATIVE DETERMINATION

Throughout their brief, Appellees consistently recast the legislative purpose behind the California Unemployment Insurance Code ("UIC" hereinafter) in terms less inconsistent with the coverage of normal pregnancy. Thus, Appellees profess an ability to discern a "basic intent"[6] of the UIC and also to determine what the legislature "most desired."[7] Based on these constructs of legislative purpose, they imply that benefits for child bearing were omitted more through oversight than design.[8]

Of course the legislative might have fashioned a plan which provided wage continuation benefits for workers absent from work for any reason. Surely many of such individuals *need* substitute income notwithstanding their absence from work is not caused by any disability. This would also include individuals whose absence from work is for socially desirable reasons, *e.g.*, pursuing education, or caring for a sick relative. Simply stated, however, the State did not devise such an all-encompassing plan. The legislative intent behind the UIC was more specific.

There is no doubt that the legislature intended to exclude benefits for normal pregnancy. Indeed, the exclusion of pregnancy benefits was essential to the legislative purpose of establishing a broad illness and injury disability program within the resources generated by an existing one

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6. Appellees' Brief at 8-9.
7. Appellees' Brief at 57.
8. Appellees' Brief at 57, n. 74.

percent employee contribution. This is manifest from the legislative history and authoritative interpretations by the California courts previously discussed.[9] If any doubt remained as to the legislative purpose, it was dispelled by the legislature's action in 1973, when it extended disability benefits to "abnormal and involuntary complications of pregnancy," but continued the exclusion of benefits for normal pregnancy. California Stats. 1973, c. 1026.

Thus, the present case requires neither a search for an unexpressed legislative rationale,[10] nor a determination of whether the relationship between the legislative intent and the terms of the statute fulfills the legislative objective.[11] The sole question before this Court is whether it is constitutionally permissible for a state to establish a benefit program for illness and injury disabilities, without at the same time providing benefits for normal pregnancy.

II.

THE UIC DOES NOT DISCRIMINATE ON THE BASIS OF SEX IN EITHER ITS PURPOSE OR EFFECT

A. The Operation of the UIC

By attempting to fix the present question in a matrix of injustices suffered by women,[12] Appellees imply that the exclusion of benefits for normal pregnancy was the result of an intent to discriminate against women. Of course, the record in this case and the history of the legislation are

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9. Appellant's Brief at 10-14.

10. Ex parte Collett, 337 U.S. 55, 58 (1949): "[T]here is no need to resort to the legislative history where the statutory language is clear."

11. *Compare Cleveland Board of Education v. LaFleur*, *supra*, 94 S.Ct. 791.

12. Appellees' Brief at 28-46; Brief Amicus Curiae of IEU at 34.

devoid of any such evidence. If this had been its purpose, the legislature chose an exceedingly poor vehicle when it enacted the UIC: Appellees nowhere challenged the indisputable fact that *women receive a disproportionate advantage in benefits paid under the UIC, even with benefits for pregnancy excluded.* Thus, women presently receive 38% of all benefits while contributing only 28% of the plan's income.

Appellees suggest that this advantage in benefits is an unintentional consequence of the benefit structure of the program which results in higher benefits-to-contributions ratios for workers with lower incomes. However, the cost of benefits is a function of duration and frequency as well as amount of benefit. Appellees admit that the *duration* of paid claims is higher for men than for women. In 1971 women claimed 44.1% of the total weeks compensated, while men claimed 55.9%.[13] Thus women claimed a significantly larger percentage of the total weeks compensated than their representation in the work force would warrant. Appellees also admit that women have 'a slightly greater" frequency rate.[14] In fact, the frequency of claim filing among women is *dramatically* higher. In 1971 the claim frequency rate for women was 25% higher than for men. Women of childbearing age (under age 40) file claims at a 27% greater rate than men under age 40 do. Most significantly, women under age 40 earning $10,000 or more per year file claims at a rate nearly 48% greater than their male counterparts.[15]

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13. Human Resources Development Department Publication No. 1031A, May 22, 1972, Table 4, Col. 2, Basic Benefits.

14. Appellees' Brief at 82 n. 105.

15. Human Resources Development Department, "1971 Claim Rate State Unemployment Disability Insurance Plan: Number of Claims Filed Per Thousand Covered Workers, by Annual Earnings, Sex and Age." See Appendix A for complete table.

Despite Appellees' protestations to the contrary,[16] it is undeniably more costly to provide disability insurance for women than for men. Appellant's main brief quoted the testimony before the Joint Economic Committee of Congress at hearings on the "Economic Problems of Women," of Herbert S. Denenberg, Commissioner of Insurance for the State of Pennsylvania, in which he acknowledged that disability coverage poses the most difficult rate problem because loss experience of women *even with pregnancy excluded* may run two and a half times higher than costs for men.[17]

Appellees also misapprehend the significance of the present distribution of benefits between men and women. The State has never contended that, apart from the basic qualifying requirements, it limits benefits according to contributions. However, it does contend the female benefit advantage demonstrates that the UIC does not operate to discriminate on the basis of sex. Since female workers presently receive a greater share of UIC benefits than males, they receive more than a fair return for their contributions.

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16. Appellees' Brief at 82.

17. Report of Proceedings, Vol. 2 at 198 (July 12, 1973), previously quoted in Appellant's Brief at 27, n. 38.

When questioned by Congresswoman Griffiths regarding his reliance on insurance industry data, the following colloquy occurred:

> Mr. Denenberg. Let me assure you that I will be the last to rush to the defense of the industry.
>
> Mrs. Griffiths. I know you will.
>
> Mr. Denenberg. And also let me assure you I will be the last to believe the insurance industry if I have any suspicions, but I do think it is clear that their statistics are valid. . . .

Report of Proceedings, Vol. 3, at 230.

To the same effect see, Brief for General Electric Company, as amicus curiae at 24; Brief for the American Telephone & Telegraph Company as amicus curiae at 8-9.

It is against this background of substantial benefit advantage to female workers that Appellees' demand for the creation of a new class of beneficiaries to be composed entirely of women must be judged.

B. The Standard of Review

Appellees apparently recognize that the facts of the UIC's operation will not support a finding of sex discrimination under traditional equal protection standards. Therefore, they devote a substantial portion of their argument to the formulation of an extraordinary standard of review in order to bolster their claim of discrimination.[18] This proposed standard has two essential elements: (1) classifications based on sex are inherently suspect and are subject to strict scrutiny; and (2) classifications based on characteristics unique to one sex are subject to the same standard. Neither of these positions is supported by the decisions of this Court.

Appellees themselves recognize that there is no foundation for the first proposition necessary to their "strict scrutiny" argument.[19] *See Frontiero v. Richardson,* 411 U.S. 677 (1973); *Reed v. Reed,* 404 U.S. 71 (1971). Nevertheless, they would expand this nonexisting first principle to require strict scrutiny of classifications drawn with reference, not to sex, but rather to a characteristic unique to one sex. As the State noted in its main brief,[20] this second contention not only goes beyond existing law, but beyond the intended effect of the proposed Equal Rights Amendment.

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18. Appellees' Brief at 28-54.

19. "Appellees believe that the time is right for a decision that sex-based classifications should be held to be suspect and subject to strict judicial scrutiny." Appellees' Brief at 52.

20. Appellant's Brief at 22-24.

Although Appellees find support in a law review article,[21] their position is directly contrary to the legislative history of the proposed amendment.[22] Moreover, the illustration contained in that article—the need for strict scrutiny with reference to a government policy prohibiting the employment of women in certain jobs because they may require periods away from work due to pregnancy—is at odds with this Court's decision in *La Fleur*. There the Court approved a school board policy conditioning re-employment following maternity leave on medical certification that the teacher was fit and her assurance that care of the child would not interfere with her duties as reasonable requirements furthering legitimate State interests.[23]

Neither is there any merit in Appellees' contention that the present case is subject to strict scrutiny because it involves intrusion by the state into the private decision as

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21. Brown, Emerson, Falk and Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L. J. 871, 894 (1971), cited in Appellees' Brief at 43-44.

22. The Senate report on the ERA states:

> "[T]he original resolution would not prohibit *reasonable* classifications based on characteristics that are unique to one sex." S.Rep. No. 92-689, p. 12 (emphasis added).

The Senate's endorsement of "reasonable" classifications is clearly more consistent with the standard applied by this Court in *Reed v. Reed, supra*, than with Appellees' requirement that any such classification be justified by a compelling state interest.

There is nothing in the debates to suggest that the Yale article's interpretation of "reasonableness" was what Congress had in mind. Indeed, Sen. Bayh remarked, in the course of a colloquy with Sen. Ervin:

> "If the Senator will read the full context of the RECORD at the time I introduced the discussion (on the Yale article) to which he refers, he will see that I said that I did not agree with all the aspects discussed, or all the points and positions taken in the article." 118 Cong. Rec. 4250 (daily ed., March 20, 1972).

23. *Cleveland Board of Education v. La Fleur, supra*, 94 S.Ct. at 799.

to whether to bear a child. By determining the proper allocation of limited resources within a nondiscriminatory state economic welfare program, the state can, in no sense, be said to have burdened the right to bear children. *La Fleur, supra,* 94 S. Ct. at 802, (Powell, J. concurring); *Dandridge v. Williams,* 397 U.S. 471 (1970).[24] A pregnant worker in California, far from being disadvantaged, is in a substantially better position than a comparable worker in any of the forty-five states which maintain no disability program at all.[25] In *Johnson v. Robinson,* 42 U.S.L.W. 4313 (March 4, 1974), the Court recently rejected the claim of a conscientious objector who had performed required alternative civilian service that the refusal to afford him the educational benefits available to veterans of military service violated the equal protection concepts of the fifth amendment and infringed his first amendment right to freedom of religion. The Court concluded that, "The withholding of educational benefits involves only an incidental burden upon Appellee's free exercise of religion—if, indeed, any burden exists at all." 42 U.S.L.W. at 4320.

In refusing to adopt a "strict scrutiny' 'test, the Court in *Johnson* noted that Congress was under no obligation to create an exception from military service for conscientious objectors, and that it would be inappropriate to judge the terms of such a liberal measure under so onerous a standard. 42 U.S.L.W. 4317 n. 14. Similarly, in *San Antonio*

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24. See discussion in Appellant's Brief at 28-29.

25. A California worker is entitled to benefits for any illness and injury disability, as well as any disability resulting from an abnormal or complicated pregnancy. This is not to say that the UIC is outside the limitations of the equal protection requirements of the fourteenth amendment, but where, as here, the classification does not impinge on a protected constitutional right, it is to be judged by traditional standards. *See* San Antonio Independent School District v. Rodriguez, 93 S.Ct. 1287 (1973).

Independent School District v. Rodriguez, 93 S. Ct. 1287, 1300 (1973), the Court held that the Texas system of school finance, "should be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution," where the program was viewed as "affirmative and reformatory." Certainly, the State of California was under no obligation to establish the UIC, which is a liberal program for the benefit of its working population. As demonstrated above, the UIC is especially liberal in its distribution of actual benefits to female workers.

This Court has repeatedly recognized that, because of the complex practical problems faced by states in resolving conflicting demands for limited state resources, it is particularly inappropriate to apply rigid standards of review to classifications made within social welfare programs. *Rodriguez, supra; Jefferson v. Hackney*, 406 U.S. 535 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970). In *Dandridge*, the Court stated that, "[The rational basis test] is the standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic policy." 397 U.S. at 485-486.

There is no logical distinction between the claim advanced by Appellees that the UIC discriminates by excluding benefits which would inure exclusively to one sex, and a claim that any state program discriminates when an exclusion from benefits disproportionately disadvantages one sex or the other.[26] It is difficult to conceive of any state program which could withstand such a test. Certainly, under

26. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), where the Court in a Title VII case held that an employer was required to justify an employment practice on grounds comparable to the compelling state interest requirement, where the practice was found to have had disparate impact on a group protected by Title VII.

Appellees' theory no legislature could even enact a benefit program without the possibility of an open-ended commitment of state resources due to unforeseen categories of beneficiaries, which, if composed predominately of one sex or the other, could claim constitutional entitlement. However, this Court has specifically rejected such a result. In *Jefferson v. Hackney, supra,* the Court denied a constitutional challenge to the different limits placed by the State of Texas on welfare grant categories. The Court stated:

> [G]iven the heterogeneity of the Nation's population, it would only be an infrequent coincidence that the racial composition of each grant class was identical to that of the others. The acceptance of appellants' constitutional theory would render suspect each difference in treatment among the grant classes, however otherwise lacking in racial motivation and however otherwise rational the treatment might be. Few legislative efforts to deal with the difficult problems posed by current welfare programs could survive such scrutiny, and we do not find it required by the Fourteenth Amendment. 406 U.S. at 548-549.

III.

THE DESIGN AND SCOPE OF THE UIC DO NOT REQUIRE INCLUSION OF BENEFITS FOR NORMAL PREGNANCY

Appellees assert that California's decision to exclude benefits for normal pregnancy is constitutionally impermissible because the UIC covers a number of conditions, *some* of which share *some* of the characteristics of pregnancy. For example, Appellees assert that the coverage of "cosmetic surgery" manifests sex discrimination since this is also a "voluntary" disability. Certainly any comparison of pregnancy and cosmetic surgery ends with voluntariness. Truly voluntary cosmetic surgery[27] repre-

27. Excluding *restorative* surgery which is part of the treatment of an illness or injury.

sents a miniscule portion of the claims filed under the UIC, approximately 0.12% of all disability claims filed, according to a survey by Appellant.[28] Moreover of these claims, 85.5% were filed by women. Neither have "sex change" operations placed a substantial demand upon the fund's resources.

In addition, Appellees cite conditions which are unique to, or allegedly predominant in, males, *e.g.*, hemophilia, prostatectomies, and hernias. However, Appellees overlook conditions unique to females which are also included, *e.g.*, breast and uterine cancer and removal of ovarian cysts. Appellees also ignore an overriding quantitative difference between pregnancy and all of the sex-unique or "voluntary" conditions cited in Appellees' Brief. None of these conditions, or all of them taken together, could ever statistically approach the number or extent of pregnancy-related claims, or the impact of such claims on the UIC.

In *Johnson v. Robinson*, ... U.S. ....., 42 U.S.L.W. 4313 (March 4, 1974), this Court rejected the contention that failure to provide educational benefits under the Veterans' Readjustment Act of 1966 to a conscientious objector who performed alternate civilian service constituted a violation of the Fifth Amendment's guarantee of equal protection. The district court sustained this claim because both military veterans and conscientious objectors have their economic and educational goals and careers interrupted as a result of Selective Service provisions. This Court reversed, stating:

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28. Because of the repeated references to cosmetic surgery by Appellees in this case, Appellant ordered all claims offices to segregate and record claims submitted for cosmetic surgery during a three month period from November 12, 1973 through February 15, 1974. Claims for cosmetic surgery were 221 out of a total of 189,140 claims filed; 32 were submitted by men, 189 by women.

> But this finding of similarity ignores that a common characteristic shared by beneficiaries and nonbeneficiaries alike, is not sufficient to invalidate a statute when other characteristics peculiar to only one group rationally explain the statute's discriminatory treatment of the two groups. 42 U.S.L.W. at 4318.

As discussed in detail in Appellant's brief,[29] pregnancy and the absences from work associated with pregnancy are dissimilar in significant respects from illness and injuries and the absences from work associated with those conditions. Pregnancy is neither an illness nor an injury but is a normal biological function. To a considerably greater extent than illness or injury, it is voluntary and subject to planning. It generally prompts a request for leave which extends beyond the period of inability to work, and which is in significant part determined by the welfare of the child rather than the mother.[30] Pregnancy and childbirth, unlike illness and injury, often result in a decision to leave the work force. Finally, pregnancy has a frequency and duration rate which dwarfs any other condition covered by the UIC. The State of California contends that this *combination* of factors causes pregnancy to be substantially different from illness and injury for disability benefit purposes so that workers who are pregnant and those who are disabled due to illness and injury are not "similarly circumstanced." *Reed v. Reed, supra,* at 75-76.

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29. Appellant's Brief at 16-24.

30. Contrary to Appellees' characterization, California does not contend that doctors and pregnant workers will collude to "defraud" the State. It does expect that doctors, rightly concerned primarily for the welfare of the baby as well as the patient, will be less accurate determiners of the mother's period of actual disability than they are in cases of illness and injury where they are concerned solely with the patient's condition. This expectation has been verified by the *certified* claims received to date, as well as by the experience of other states.

Appellees also assert that because the UIC is based upon a "pooled risk" system[31] the State cannot exclude particular conditions because they constitute a substantially greater risk than others. Of course, all insurance is based on the pooling of some risks and the exclusion of others. For example, home owner insurance plans may pool the risks on brick and frame house and yet, in some areas, exclude damage to any houses by flood, or exclude coverage of uniquely expensive items like jewelry and art work; and automobile insurance plans may include large and small cars, but exclude damage or injury incident to a demolition derby. Appellees make no mention of another major risk which is also excluded from the UIC on the basis of cost: the short term disability.[32] Clearly, nothing in the Consti-

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31. Appellees have quite inaccurately described the "pooled risk" concept. Appellee's Brief at 12. Appellees quote from the Final Report of the California Assembly's Joint Committee on Unemployment Compensation Disability Insurance (1966), which report, at p. 27, defines a pooled risk fund: "a monopolistic system, with no room . . . for either private insurance companies or self insurance." The same report acknowledges that California has never been a completely pooled fund since it allows both private insurance and self insurance. California's tolerance of competition led to serious problems in prior years. Private insurance carriers wrote disability insurance for employers whose work force was primarily young and male, and whose disability rate is lowest of any group. While desirable risks were being privately insured, the adverse risks remained in the state fund and the high claims level virtually depleted the state fund's reserves. The State's response took the form of a regulation which required private insurance carriers to have not less than 20% women in any insured group. (Cal.Admin.Code, Title 22, section 3254(h)-1). Viewed in this perspective, the Joint Interim Committee's discussion concerning pooled risks demonstrates *Appellant's* contention: the State legislature has continually played watchdog to the financial solvency of the disability insurance fund and has always insisted on actuarial soundness. Moreover, it has, from the very beginning, wrestled with the problem of the high cost of insuring women.

32. Basic benefits under the UIC, absent hospitalization, begin with the eighth day of disability. A shorter waiting period for disability benefits is among the most costly of benefits. *See* Sinai, N., DISABILITY INSURANCE IN CALIFORNIA. (U. Mich. School of Pub. Health, 1965) at 23.

tution or in logic prohibits a state which has pooled certain risks from excluding other high risk conditions which are incompatible with the very purpose of its program.

Appellees further contend that the coverage of "unemployed workers",[33] older workers who have a lower rate of return to the work force,[34] and the structuring of benefits to the advantage of lower wage earners,[35] are all inconsistent with the exclusion of benefits for normal pregnancy.

Thus, Appellees read the Constitution as not permitting a state to (1) utilize a pooled risk system and exclude pregnancy, (2) cover the unemployed and parttime worker and exclude pregnancy, (3) extend benefits to lower-paid

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33. Appellee's Brief at 14. Appellees are entirely wrong in stating that the UIC does not require that a recipient of benefits intend to return to work. Proof that one continues to be in the labor market is required, under Title 22, Cal. Admin. Code section 2601.1(r) which provides in part:

> "If an individual has been neither employed nor registered for work at a public employment office or other place approved by the director for more than three months immediately preceding the beginning of a period of disability, he is not eligible for benefits unless the department finds that the unemployment for which he claims benefits is due to a disability and is not due to his previous withdrawal from the labor market."

Benefits have consistently been denied to persons who could not show this continued connection. See, for example, the following decisions of the California Unemployment Insurance Appeals Board in which benefits were denied: No. D-147, to a student who had the necessary income credits but who had returned to school; No. D-465, to a carpenter on leave of absence to build his own house; No. DC-10, to a retired person; and D-362, to a part time cannery worker disabled during the off-season. Each of these denials was based upon withdrawal from the labor market.

34. Appellees' Brief at 17. It has been the experience of one employer that 90% of non-returnees following disability leave either died or became eligible for company pensions. "Only 0.57% of Illinois Bell's employees actually resigned from company service after absences presently covered by the sickness and accident disability program." Brief of AT&T as Amicus Curiae at 10a, n. 10. It is also likely that many of the "exhaustees" simply have not recovered from their disability though they have exhausted benefits.

35. This argument is difficult to appreciate since Appellees attribute the disproportionate benefits advantage of female workers to this feature of the plan. Appellees' Brief at 83.

workers and exclude pregnancy, (4) include "virtually any disability," including some which are voluntary or subject to planning, and exclude pregnancy, and (5) provide benefits for conditions unique to one sex or the other and exclude pregnancy. But the decisions of this Court make clear that the Constitution does not deny states the flexibility to deal with complex social problems.

Covering conditions concentrated among males or females or older or poorer workers, and not including conditions related to normal pregnancy, are just the type of policy decisions which the state *is* entitled to make. This Court has repeatedly recognized that a state has the discretion to determine the resources it will commit to social welfare programs and to make reasonable classifications to define the beneficiaries of such programs. *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970). Just as this Court has held that a state may lawfully prefer the aged and infirm to families with dependent children in the distribution of welfare funds, *Jefferson v. Hackney, supra*, so the state may consciously prefer benefits for the old or the poor to the provision of maternity benefits for normal pregnancy.

Neither is it sufficient to point, as Appellees do, to alleged imperfections in the symmetry of the legislative program. As the Court noted in *Jefferson v. Hackney, supra*, at 546:

> [I]n "the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." A legislature may address a problem "one step at a time," or even "select one phase of one field and apply a remedy there, neglecting the others." So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket. [Citations omitted.]

IV.

THE COST OF PROVIDING DISABILITY BENEFITS FOR NORMAL PREGNANCY IS IMMENSE: PROVIDING THEM WOULD RESULT IN A SUBSTANTIAL DISADVANTAGE TO MALE WORKERS AND WOULD BANKRUPT THE FUND AS PRESENTLY CONSTITUTED

A. Cost of Pregnancy Coverage

Appellees offered no evidence on the cost of providing disability benefits for normal pregnancy in the court below. In this Court, Appellees for the first time take issue with the estimates made by the State of California. However, their criticism of the State's projections is based solely upon speculation and opinion, and upon the unwarranted assumption that claims for normal pregnancy would be limited to seven weeks.[36] The only credible evidence of the duration of pregnancy claims are the claims actually received to date by the State, which *average* 15 weeks' duration.

The experience of other states demonstrates that California's estimate of a 36%[37] increase in costs resulting from the inclusion of benefits for pregnancy is not inflated. In New Jersey, where claims are limited to eight weeks' duration, pregnancy claims accounted for between 49.09% and 57.51% of all benefits paid under that plan between 1969 and 1973.[38] Similarly, the coverage of pregnancy under the

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36. Appellee's Brief at 88. A policewoman in Chicago recently recovered $10,000 back pay and benefits for *12 months* when she was off from work due to childbirth, based on a claim for benefits accorded in connection with disability leaves. Chicago Daily News, March 14, 1974, at 1.

37. Appellant's estimate is that pregnancy benefits would cost $131 million, or a 36% cost increase. The revision upward from the $120.2 million reflects a higher benefit level and not, as erroneously indicated in Appellant's Brief at 31, a revised estimate of duration.

38. *See* Appendix B.

Hawaiian disability program has resulted in an increase in disability premiums for females from $4.00 per month to $8.76 per month.[39]

Appellees are also plainly wrong in asserting that the State's 36% cost increase estimate is inconsistent with the experience of private insurers.[40] The Health Insurance Association of America and the American Life Insurance Association, which represent some 500 life and health insurance companies, accounting for approximately 92% of the total life insurance and 90 percent of the total private health insurance programs in force in the United States, filed joint comments in response to a proposal by the Office of Federal Contract Compliance to require that federal contractors provide disability benefits for workers absent from work due to pregnancy.[41] In estimating the costs of such a requirement, the comments stated:

> Under a typical disability income plan with an average group of employees [assuming 38% to 40% are women], the addition of a disability income benefit to cover maternity absences would result in an additional cost to the employer of about 40 to 50 percent of his current costs for the plan.[42]

Moreover, Appellees misrepresent the data supplied to the Citizens Advisory Council on the Status of Women by Aetna Insurance and Casualty Company.[43] While these computations were based on a plan providing 26 weeks of possible benefits in the case of illness and injury, the 10%

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39. *See* Appendix C.

40. Appellees' Brief at 89.

41. 38 Fed. Reg. 35336-35338 (Dec. 27, 1973).

42. Joint HIAA-ALIA Comment at 9 (Feb. 11, 1974).

43. Appellees' Brief at 89 n. 130. *See* discussion in Brief of the American Telephone and Telegraph Company as Amicus Curiae, at 3-4.

increase in cost cited by Appellees was based on adding coverage for pregnancy *for no more than six weeks.*[44] Thus, the reasonableness of California's estimate of the cost of covering pregnancy is supported by the only evidence on the question in the record, the experience of other states with programs which provide coverage for pregnancy, as well as by the experience of the insurance industry with private disability programs.

Alternatively, Appellees contend that no matter how large the costs of providing benefits for normal pregnancy, the legislature is constitutionally barred from considering these expenses. It would be a most unusual constitutional doctrine which holds the cost of benefits irrelevant to a legislative consideration of a benefit program. There is certainly no warrant for such a holding in the decisions of the Court.

The substantial cost which will certainly result from providing benefits for normal pregnancy is dramatically different from the circumstances of the cases on which Appellees rely. Thus, in *Reed v. Reed*, 404 U.S. 71 (1971), the Court was properly unimpressed by the minimal added costs which might be occasioned by the need to hold hearings in the rare cases where applicants of the same degree of relationship sought to administer the estate of a decedent. Similarly, in *Frontiero v. Richardson*, 411 U.S. 677 (1973), the Court rejected a justification based on speculative cost savings resulting from administrative convenience.

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44. In addition, this calculation was based on a $60 per week benefit, excluded California's added cost for hospitalization benefits, and was based on a wide range of female participation in the employee group (31 to 40 percent). Citizens Advisory Council on the Status of Women, Information from Insurance Industry Relating to Coverage of Childbirth in Health Insurance and Temporary Disability Insurance, June 9, 1971, at 2. *See also* Appendix C.

Indeed, the plurality opinion noted, "The Government offers no concrete evidence, however, tending to support its view that such treatment in fact saves the Government any money." In *Memorial Hospital v. Maricopa County*, 42 U.S.L.W. 4277 (February 26, 1974) the Court found that the County's claim of cost savings as a result of a residence requirement imposed upon indigents seeking free hospitalization "may well be illusory." The Court noted that "[t]he lack of timely medical care could cause a patient's condition to deteriorate to a point where more expensive emergency hospitalization (for which no durational residency requirement applies) is needed." 42 U.S.L.W. at 4282.

By contrast, where the cost implications of a decision are clear, it is an appropriate subject for legislative consideration. *United States v. Kras*, 409 U.S. 434 (1973). This is especially true "in the area of economics and social welfare." *Kras, supra*, at 446; *see, Dandridge v. Williams, supra; Jefferson v. Hackney, supra.*

B. Impact of Pregnancy Coverage on Male and Female Share of Benefits

Contrary to Appellees' assertions,[45] it is clear that the coverage of normal pregnancy is more costly than any other disability or group of related disabilities presently covered by the program. This is manifest from the experience of the New Jersey program, where approximately half of all benefits are devoted exclusively to pregnancy.[46] It is further demonstrated by the broadly based data[47] presented in the

45. Appellees' Brief at 90-91.

46. See Appendix B.

47. The data in this brief was based on the experience of 894,505 and 955,752 employees in the respective survey years, almost half of whom were women. Brief of the American Telephone & Telegraph Company as Amicus Curiae, at 5, nn. 9, 10.

amicus brief of the American Telephone and Telegraph Company. There, even assuming a pregnancy claim duration of only eight weeks, pregnancy would account for 21% of the total disability days compensated under a plan very similar in its terms to the UIC. This would be larger than the total disability days resulting from any of the seventeen categories of related disabilities—even when the disability days taken by men and women are combined.[48]

It is apparent that the inclusion of such a substantial benefit category which can only be utilized by women will have a substantial impact on the male and female share of benefits, further enlarging the existing female benefit advantage. As noted in the State's main brief,[49] women presently receive $1.27 in benefits for each dollar contributed to the fund, while men receive $.80 for each dollar of contribution. The addition of benefits for normal pregnancy, assuming no increase in contributions or decrease in benefits,[50] would increase the female benefit rate to $2.33 while the male rate would remain at $.80.

It requires an extraordinary conception of the equal protection requirements of the Constitution to command such a result. Indeed, unless the exclusion of normal pregnancy is continued, the benefit levels of men and women will become grossly disproportionate. Although California does not strictly limit benefits according to contributions, the continuation of the exclusion of pregnancy may be viewed

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48. *Id.* at 11.

49. *Id.* at 26.

50. Of course, one of these two steps would be necessary to prevent the bankruptcy of the fund. If contributions were increased, these estimates of benefits per dollar contribution would be reduced from $2.33 and $.80 for both men and women but the ratio would remain the same.

as an appropriate means of providing some semblance of parity of benefits between men and women.[51]

C. Impact of Pregnancy Coverage on the Nature of the Fund

The California disability program was created from a surplus 1% employee contribution to the State unemployment insurance program. This rate has been maintained consistently throughout the twenty-seven year history of the fund, except for a six-month period when a .1% increase was necessary to forestall insolvency.[52] It is clear that the coverage of normal pregnancy would require abandonment of this limitation on contributions. Moreover, the claims for retroactive payments[53] threaten the very existence of the fund.

Appellees represent only one of many classes and subclasses of individuals who present demands on the resources of the UIC. In resolving these competing claims, the legislature has repeatedly rejected proposals to extend the UIC benefits to normal pregnancy, and has instead concentrated increased resources on the general improvement of benefits available to all workers. However, Appellees now contend that to cure "sex discrimination" in a program providing substantial benefit advantages to women, the

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51. In considering a conscientious objector's claim of constitutional entitlement to education benefits provided for veterans, the Court in *Johnson v. Robinson, supra*, noted:

> By enacting legislation exempting conscientious objectors from the well-recognized and peculiar rigors of military service, Congress has bestowed relative benefits upon conscientious objectors by permitting them to perform their alternative service obligation as civilians. Thus, Congress' decision to grant educational benefits to military servicemen might arguably be viewed as an attempt to equalize the burdens of military service and civilian alternate service, rather than an effort by Congress to place a relative burden upon a conscientious objector's free exercise of religion. 42 U.S.L.W. at 4320 n. 19.

52. Appellant's Brief at 13 n. 10.

53. Appellees' Brief at 6.

State must devote whatever resources are necessary to provide full benefits for normal pregnancy. Thus, 36% of UIC benefits would inure to approximately 5% of the work force,[54] all of whom would be women.

While all parties would probably agree that programs to provide benefits to sick and injured workers should be encouraged, acceptance of Appellees' argument will, at a minimum, discourage the establishment or expansion of such programs by other states[55] or by private employers.[56] Under their view, states could provide such benefits only if they pay a heavy constitutional qualifying fee by extending benefits to cover normal pregnancy. For the reasons set forth above, California contends that this position is constitutionally bankrupt.

There is another important aspect to Appellees' contention, since the provision of pregnancy benefits involves important questions of public policy. To what extent should

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54. Appellant's Brief at 35 n. 57 and accompanying text.

55. The deterrent effect upon other states of a requirement that pregnancy be treated as are other disabilities is illustrated by Wisconsin's recent experience. Under Wisconsin Laws of 1971, c. 125 § 270, the Wisconsin Group Insurance Board, a state agency, was directed to establish a disability income plan to provide benefits to state employees for "injury or illness." The Group Insurance Board adopted rules implementing the plan, including Wisc. Admin. Code C. Grp. 25.20 which provides that benefits shall not be payable for pregnancy "except for complications thereof." On January 2, 1974, the Wisconsin Department of Industry, Labor and Human Relations issued an order enjoining the exclusion of benefits for normal pregnancy. The Wisconsin Group Disability Board has filed a Petition for Judicial Review in the Circuit Court for Dane County, Wisconsin on the grounds urged by Appellant here, among others.

56. While studiously attempting to avoid any identification with private employers' programs, Appellees' Brief at 12, 17-18, Appellees nonetheless assert that "[R]esolution [of the present case] will almost certainly affect the interpretation of Title VII of the Civil Rights Act of 1964, Executive Order 11246, Appellees' Brief at 28.

the State support or encourage population growth? California submits that this is a question of such importance that it should be addressed directly and on its own merits. It would be manifestly improper to resolve the issue in the context of a claim for disability benefits, where the relevant considerations cannot be presented to this Court.

Dated March 19, 1974.

Respectfully submitted,

EVELLE J. YOUNGER
Attorney General of the State of California

ELIZABETH PALMER
Assistant Attorney General

JOANNE CONDAS
Deputy Attorney General
6000 State Building
San Francisco, California 94102
Telephone: (415) 557-0426

Attorneys for Appellant State of California

Appendix A

HUMAN RESOURCES DEVELOPMENT DEPARTMENT

STATE OF CALIFORNIA

971 Claim Rate of the State Plan: Number of Claims iled Per Thousand Covered Workers, by Annual Earnngs, Sex, and Age.

	Age in Report Year 1971			
	Under 40	40-49	50 and Over	All Ages
l earnings intervals	47.0	96.3	123.1	69.5
Men	42.5	78.8	118.9	65.0
Women	53.8	124.5	130.0	81.4
nder $8,500	45.0	105.1	120.9	65.4
Men	38.8	81.8	113.3	56.8
Women	52.5	123.7	128.3	79.0
,000-9,999	70.7	110.3	162.3	103.7
Men	69.5	108.3	171.3	104.6
Women	76.3	116.3	132.2	104.0
,000 and over	43.9	67.8	106.9	68.5
Men	42.8	65.6	106.5	67.8
Women	63.3	103.1	111.9	90.8

Appendix B

Ronald M. Heymann
Commissioner

Frank E. Mishell
Director

STATE OF NEW JERSEY
DEPARTMENT OF LABOR AND INDUSTRY
DIVISION OF UNEMPLOYMENT AND DISABILITY INSURANCE
Labor and Industry Building
Trenton, New Jersey 08625

Address Reply to Writer
For Telephone Contact, Call
609-292-2700

March 19, 1974

Ms. Joanne Condas
Deputy Attorney General
Room 6000 State Building
San Francisco, California 94102

Dear Ms. Condas:

In response to your request enclosed you will find a copy of a monthly report prepared for me by the disability during unemployment activity of New Jersey's temporary disability insurance service. These disbursements represent a payment of benefits from the State Disability Benefits Fund that are not charged back to individual employers.

In order to derive a truer evaluation of the cost of pregnancy benefits these figures should be extrapolated by an increase of 20%. This 20% would represent the cost of payment for pregnancy purposes made under the State plan, and these costs are charged back to the individual employers.

A further cost to the taxpayer is the cost of pregnancy benefits paid under approved private plans. As you probably realize New Jersey copied California to some extent

in permitting employers to establish private plans for the payment of temporary disability benefits in lieu of the State plan. We estimate that the cost of these pregnancy benefits to the private plan sector would be approximately 29% more than the benefits paid by the disability during unemployment figures given herewith.

The disbursements of public moneys under the unemployment and disability laws in New Jersey are a matter of public record and available to any interested party who may properly request same. The figures given to you are included in this category.

Very truly yours,
/s/ B. N. Sheff
B. N. Sheff
Chief of Private Plan
Disability Benefits

BNS:lrf
Enclosure

To: B. N. Sheff, Chief of Private Plan
Disability Benefits

From: William I. Elder
Disability Claims Section

Subject: Below are Disability Figures for Period Beginning July 1, 1969 and Ending January 31, 1974

	No. of Preg. Claims Rec'd.	All Other Disab. Claims	Grand Total of Claims	TOT. CLAIMS DISB. Proc.	Ret. SP	Pregnancy Benefits Paid	Ben. Pd. Other Than Preg.	Grand Tot. Ben. Paid	No. of Ben. Wks. Pd.-Preg.	Tot. No. Indiv. Preg. Awards
7/1/69-6/30/70	14,078	12,864	26,942	24,650	1579	$5,024,684	$3,711,948	$ 8,736,632	93,658	12,349
7/1/70-6/30/71	15,548	15,221	30,769	29,828	1429	6,130,088	5,352,147	11,482,235	108,789	14,744
7/1/71-6/30/72	14,182	15,857	30,039	28,687	1140	5,887,589	5,990,126	11,877,715	98,709	13,163
7/1/72-6/30/73	11,925	14,324	26,249	24,974	1130	5,072,636	5,260,378	10,333,014	81,711	10,860
1974										
January	1,041	1,240	2,281	2,128	78	457,739	482,499	940,238	7,012	875

Appendix C

The Equitable Life Assurance Society of the United States [Letterhead]

LETTER "A"
95,000 POLICY SERIES

TO: OUR HAWAII TEMPORARY DISABILITY POLICYHOLDERS

RE: INCLUSION OF PREGNANCY AND TERMINATION OF PREGNANCY AS A DISABILITY UNDER THE TEMPORARY DISABILITY INSURANCE LAW

We have been informed by the State of Hawaii, Department of Labor and Industrial Relations, that Section 392-3, Hawaii Revised Statutes, has been amended effective May 8, 1973 to include pregnancy and termination of pregnancy under the definition of "Disability" under the Hawaii Temporary Disability Insurance Law, when the attending physician certifies that an employee is totally disabled because of this condition.

It has been determined that as a result of this increase in claim liability, the premium rate applicable to females will be increased from $4.00 per female per month to $8.76 per female per month effective August 1, 1973. The premium rate for males will remain at $3.25 per male per month.

This increase, however, will not be put into effect during the current 60-day price "freeze" period. You will be informed regarding the implementation of the increase in the cost of this coverage when Phase IV procedures are established, which is expected shortly.

Your policy automatically provides for this change and no amendment is required.

Very truly yours,
/s/ J. M. TURNER
J. M. Turner
State Plans Manager

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1973

No. 73-640

DWIGHT GEDULDIG, Appellant,

vs.

CAROLYN AIELLO, individually and on behalf of all others similarly situated, Appellees.

DWIGHT GEDULDIG, Appellant,

vs.

AUGUSTINA D. ARMENDARIZ, et al., individually and on behalf of all other women similarly situated, Appellees.

Consolidated Cases on Appeal from the United States District Court for the Northern District of California

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SUPPLEMENTAL BRIEF

SUBJECT INDEX

I.

ONLY 8% OF NEW JERSEY'S DISABILITY INSURANCE BENEFITS ARE PAID FOR DISABILITIES CAUSED BY PREGNANCY OR CHILDBIRTH, NOT 50% AS CLAIMED BY APPELLANT 2

II.

THE AMENDMENT OF THE HAWAII DISABILITY INSURANCE LAW TO COVER DISABILITIES ARISING FROM NORMAL PREGNANCY AND CHILDBIRTH HAS RESULTED IN ALMOST NO INCREASE IN TEMPORARY DISABILITY INSURANCE RATES 7

Conclusion 11

Pursuant to Leave of Court granted at oral argument, Appellees submit the following Supplemental Brief. Leave to supplement was granted only with regard to allegations of fact presented for the first time in the Reply Brief.

I

ONLY 8% OF NEW JERSEY'S DISABILITY INSURANCE BENEFITS ARE PAID FOR DISABILITIES CAUSED BY PREGNANCY OR CHILDBIRTH, NOT 50% AS CLAIMED BY APPELLANT.

Attempting to lay a last-minute foundation for his claim that the cost of benefits for childbirth-caused disabilities would be so overwhelming as to justify partially excluding women from coverage on the basis of their sex, Appellant relied heavily in his Reply Brief and at oral argument on his allegation that the cost for such benefits in New Jersey has represented 50% or more of all disability insurance payments. Reply Brief at 17, 20, and Appendix B. However, Appellant has

New Jersey program differs

The New Jersey program differs from that of California in significant respects.[1] The program is divided into three separate parts: state and private plans for disability suffered during employment, and a separate state fund for disabilities suffered during unemployment.

All of Appellant's statistics regarding the cost of benefits for childbirth-caused disabilities relate solely to the relatively small "disability during unemployment" fund. This fund pays out only 10% of total New Jersey disability benefits.[2] Funds are paid to eligible individuals who have been unemployed for a minimum of two weeks

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1 / See, e.g., Brief for Appellees at 7, 10, 16.

2 / This estimate is derived as follows: the state plan for coverage of disability during employment in 1972 covered 66.8% of all covered workers, with private plans covering the other 33.2%.

ing their disability. Because oyers in New Jersey commonly lay

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in 1972, of all benefits paid by the state plan fund and the disability-during-unemployment fund combined, 16.6% of the total were paid out of the "unemployment" fund. No statistics are compiled regarding total benefits paid by private plans, but assuming benefits to be proportional (since the statute requires a benefit package equal to that of the state plan), the "unemployment" fund pays only 10.0% of total New Jersey disability insurance payments. See Appendix A, Tables 9, and 25. These figures were obtained from Donald L. Diefenbach, Principal Statistician, State of New Jersey, Department of Labor & Industry, Division of Planning & Research. They (and the tables contained in Appendices B and C) represent an update of tables designated by the same numbers contained in: New Jersey Department of Labor & Industry, Division of Planning & Research, Two Decades of Temporary Disability Insurance in New Jersey: A Statistical Chronology (March 1970) and New Jersey Department of Labor & Industry, Division of Planning & Research, Temporary Disability Insurance Statistics for New Jersey 1949-1970 (May 1971). Appellees selected 1972, rather than 1973, as the basis for calculations because complete 1973 figures were not available for Table 9. Figures on the first two quarters of 1973 suggest that

off pregnant women more than two weeks before they become disabled, 74.0% of the claims for disability caused by pregnancy or childbirth have been paid out of the small "disability during unemployment" fund.[3]

Appellant's statistics, and the letter preceding it (Reply Brief, Appendix B), indicate that approximately 50.0% of claims from the "disability during unemployment" fund are for disabilities caused by pregnancy and childbirth. What Appellant does not present to the Court is the fact that pregnancy and childbirth disability claims represent only 8.0%[4] of

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there were no significant differences between the 1972 and 1973 covered employment distributions.

3 / In 1970, 74.0% of such benefits were paid out of the "unemployment" fund. In 1972, 74.1% were so paid. See Appendix B, Table 30.

4 / In 1972, 48.9% of all "disability-during-unemployment" benefits were paid for disabilities caused by pregnancy or childbirth. Only 3.4% of regular state plan benefits were paid for such disabilities. Assuming 3.4% of private

total New Jersey temporary disability insurance payments.[5/]

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plan benefits were paid for such disabilities, and weighting these statistics by the size of each fund, slightly less than 8.0% of all disability insurance benefits in New Jersey were paid for disabilities resulting from pregnancy or childbirth. See Appendix C, Table 31.

5/ The New York legislature is currently considering S-2041, a bill which would amend the New York disability laws to cover pregnancy and childbirth related disabilities. According to Joseph Angelo, associate General Counsel, New York Workman's Compensation Board, the estimated cost increase for coverage under the New York state disability insurance program, based on 1972 benefit levels, is approximately $12 million. Total program costs in 1972, without pregnancy-related disabilities, was $350 million.

Throughout this proceeding Appellant has sought to show that extending coverage to women on the same basis it is now granted to men would result in massive cost increases. The New Jersey experience, for the reasons stated above, contradicts rather than confirms Appellant's cost prediction.

II

THE AMENDMENT OF THE HAWAII DISABILITY INSURANCE LAW TO COVER DISABILITIES ARISING FROM NORMAL PREGNANCY AND CHILDBIRTH HAS RESULTED IN ALMOST NO INCREASE IN TEMPORARY DISABILITY INSURANCE RATES.

Appellant, in his Reply Brief, pp. 17-18, states, "[T]he coverage of pregnancy under the Hawaiian disability program has resulted in an increase in disability premiums for females from $4.00 per month to $8.76 per month." In support of this statement he attaches as Appendix C a memorandum from Equitable

Life Assurance Society of the United States to its Hawaii Temporary Disability Policyholders announcing such an increase. The Hawaii amendment, passed May 8, 1973, requires the inclusion of disabilities arising from normal pregnancy and childbirth by Hawaii employers covered by the state program.

Appellant, by failing to place the Equitable Memorandum in its proper context, creates a misleading impression of the Hawaii temporary disability insurance experience. The Hawaii program, unlike the California program, has no state fund, but rather requires and regulates private insurance of Hawaii employees. At least 90 percent of the employees in Hawaii are insured by six insurers,[6] only one of which has raised its rates at all as a result of the

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6 / Those insurers are: Travelers Insurance Company, Industrial Indemnity Insurance Company, Pacific Insurance Company, Pacific Guardian Insurance Company, First Insurance of Hawaii, and Hawaii Insurance and Guarantee Company. This information was obtained in a telephone conversation

May 8, 1973 amendment.[7] Equitable Life Assurance Company, whose rate increase is cited by Appellant, is not

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with Orlando K. Watanabe, Administrator of the Temporary Disability Insurance Division of the Hawaii Department of Labor and Industrial Relations.

7/ That company is Industrial Indemnity. According to Paul Fasi, Assistant Manager of the Industrial Indemnity home office in San Francisco, the rate increase varies according to the percentage of female employees in the insured's workforce as follows:

Females	Increase
0-25%	No Increase
26-49%	7% Increase
50-74%	15% Increase
75-100%	22% Increase

among the major temporary disability insurers in Hawaii[8/] and, Equitable's rate increase, rather than being representative of the insurance company response to the Hawaii amendment, constitutes a distinct aberration in the total Hawaii disability insurance picture.

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8 / This fact was confirmed in telephone conversations with Orlando K. Watanabe, Administrator of the Hawaii Temporary Disability Insurance Division, Paul Fasi, Assistant Manager of the Industrial Indemnity home office in San Francisco, California, and John Jacobs, head of the Temporary Disability Insurance Sales Division of Traveler's Insurance in Hawaii, all of whom indicated that Equitable insures only a small percentage of the Hawaii temporary disability insurance market.

CONCLUSION

For the reasons stated above, neither the Hawaii nor New Jersey figures, presented for the first time in Appellant's Reply Brief, fairly reflect the actual additional cost of covering childbirth-related disabilities under those state programs. The actual experience in both those states instead lend support to Appellees' cost estimates. (Appellees' Brief, pp. 84-89.) Even if the relative or absolute cost of extending coverage to women on the same basis as now provided men is deemed material and relevant to the constitutional issues here presented, which Appellees deny (Appellees' Brief, pp. 89-94), the record is simply devoid of evidence which would support Appellant's cost estimates.

Respectfully submitted,

WENDY WEBSTER WILLIAMS
PETER HART WEINER
Counsel for Appellees

APPENDIX A

TABLE 9

COVERED EMPLOYMENT
TOTAL, STATE PLAN, AND PRIVATE PLANS
BY CALENDAR QUARTER

Year & Quarter	Covered Employment			Percentage Distribution	
	Total	State Plan	Private Plans	State Plan	Private Plans
1971 1	2,006,232	1,276,684	729,548	63.6	36.4
2	2,080,237	1,327,963	752,274	63.8	36.2
3	2,075,348	1,330,627	744,721	64.1	35.9
4	2,062,038	1,345,623	716,415	65.3	34.7
1972 1	2,072,889	1,345,538	727,351	64.9	35.5
2	2,226,858	1,460,894	765,964	65.6	34.4
3	2,243,598	1,483,626	759,972	66.1	33.9
4	2,259,663	1,510,409	749,254	66.8	33.2
*1973 1	2,237,383	1,485,337	752,046	66.4	33.6
2	2,336,750	1,555,700	781,050	65.7	34.3

*Complete Figures for 1973 are not yet available.

TABLE 25
BENEFIT PAYMENTS
STATE PLAN AND DISABILITY-DURING-UNEMPLOYMENT

Year	Benefit Payments			Percentage Distribution	
	Total	State Plan	Disability During Unemployment	State Plan	Disability During Unemployment
1971	65,131,391	53,130,606	12,000,785	81.6	18.4
1972	68,167,910	56,896,393	11,271,517	83.5	16.5
1973	75,617,156	65,433,890	10,183,266	86.5	13.5

APPENDIX B

TABLE 30

SUMMARY OF PREGNANCY AWARDED CASES,
WEEKS COMPENSATED, AND BENEFIT PAYMENTS

STATE PLAN AND DISABILITY-DURING-UNEMPLOYMENT

	State Plan			Disability-During-Unemployment		
Year	Awarded Cases	Weeks Compensated	Benefit Payments	Awarded Cases	Weeks Compensated	Benefit Payments
1971	4670	32,244	1,778,514	14,472	106,224	6,204,219
1972	4719	33,134	1,935,816	12,036	91,086	5,516,640
1973	7364	53,574	3,238,248	10,095	76,598	4,893,901

APPENDIX C

TABLE 31

PREGNANCY AS A PERCENTAGE OF TOTAL PROGRAM
AWARDED CASES, WEEKS COMPENSATED, AND BENEFIT PAYMENTS

STATE PLAN AND DISABILITY-DURING-UNEMPLOYMENT

Pregnancy As A Percentage Of Total

Year	State Plan			Disability-During-Unemployment		
	Awarded Cases	Weeks Compensated	Benefit Payments	Awarded Cases	Weeks Compensated	Benefit Payments
1971	4.9	3.7	3.3	61.8	52.6	51.7
1972	4.7	3.7	3.4	57.3	49.9	48.9
1973	6.8	5.5	4.9	55.7	49.1	48.7

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GEDULDIG, DIRECTOR, DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT *v.* AIELLO ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 73-640. Argued March 26, 1974—Decided June 17, 1974

California has a disability insurance system for private employees temporarily disabled from working by an injury or illness not covered by workmen's compensation, under which an employee contributes to an Unemployment Compensation Disability Fund one percent of his salary up to an annual maximum of $85. A disability lasting less than eight days is not compensable, except when the employee is hospitalized. Benefits are not payable for a single disability exceeding 26 weeks. A disability resulting from an individual's court commitment as a dipsomaniac, drug addict, or sexual psychopath is not compensable, nor are certain disabilities attributable to pregnancy. Appellees, four women otherwise qualified under the program who have suffered employment disability because of pregnancies, only one of which was normal, challenged the pregnancy exclusion. A three-judge District Court upheld their contention that the exclusion violated the Equal Protection Clause. The court denied a motion to reconsider based on a state appellate court ruling, in which appellant who administers the program has acquiesced, confining the exclusion to only normal pregnancies. The California program, in terms of the level of benefits and risks insured, is structured to maintain the solvency of the Disability Fund at a one-percent annual level of contribution. The District Court acknowledged that coverage of disabilities resulting from normal pregnancies would entail substantial additional expense. But it concluded that this increased cost could be accommodated through adjustments in the rate of employee contribution, the maximum benefits payable,

Syllabus

"and the various other variables affecting the solvency of the program." *Held:*

1. The appellate ruling and administrative guidelines excluding only normal pregnancies have mooted the case as to the three appellees who had abnormal pregnancies and whose claims have now been paid. P. 6.

2. California's decision not to insure under its program the risk of disability resulting from normal pregnancy does not constitute an invidious discrimination violative of the Equal Protection Clause. The program does not discriminate with respect to the persons or groups eligible for its protection, and there is no evidence that it discriminates against any definable group or class in terms of the aggregate risk-protection derived from the program. The sole contention is the asserted under-inclusiveness of the program's coverage as a result of the exclusion of disabilities resulting from normal pregnancy. The State is not required by the Equal Protection Clause to sacrifice the self-supporting nature of the program, reduce the benefits payable for covered disabilities, or increase the maximum employee contribution rate just to provide protection against another risk of disability, such as normal pregnancy. "[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge* v. *Williams*, 397 U. S. 471, 486–487. Pp. 6–12.

359 F. Supp. 792, reversed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 73-640

Dwight Geduldig, Etc., Appellant, v. Carolyn Aiello et al. | On Appeal from the United States District Court for the Northern District of California.

[June 17, 1974]

MR. JUSTICE STEWART delivered the opinion of the Court.

For almost 30 years California has administered a disability insurance system that pays benefits to persons in private employment who are temporarily unable to work because of disability not covered by workmen's compensation. The appellees brought this action to challenge the constitutionality of a provision of the California program that, in defining "disability," excludes from coverage certain disabilities resulting from pregnancy. Because the appellees sought to enjoin the enforcement of this state statute, a three-judge court was convened pursuant to 28 U. S. C. §§ 2281 and 2284.[1] On

[1] This litigation began as two separate suits on behalf of California employees who had paid sufficient amounts into the Disability Fund to be eligible generally for benefits under the program. Carolyn Aiello brought her suit against appellant in the federal District Court. Augustina Armendaris, Elizabeth Johnson, and Jacqueline Jaramillo jointly initiated their suit as a petition for a writ of mandate in the California Supreme Court. Both suits were brought as class actions and asserted the unconstitutionality of § 2626 of the California Unemployment Insurance Code under the Equal Protection Clause of the Fourteenth Amendment. The appellant removed the state court suit to the federal District Court, where the two actions were consolidated. See 28 U. S. C. § 1441 (b).

the appellees' motion for summary judgment, the District Court, by a divided vote, held that this provision of the disability insurance program violates the Equal Protection Clause of the Fourteenth Amendment, and therefore enjoined its continued enforcement. 359 F. Supp. 792. The District Court denied a motion to stay its judgment pending appeal. The appellant thereupon filed a similar motion in this Court, which we granted. — U. S. —. We subsequently noted probable jurisdiction of the appeal. — U. S. —.

I

California's disability insurance system is funded entirely from contributions deducted from the wages of participating employees. Participation in the program is mandatory unless the employees are protected by a voluntary private plan approved by the State.[2] Each employee is required to contribute one percent of his salary, up to an annual maximum of $85.[3] These contributions are placed in the Unemployment Compensation Disability Fund, which is established and administered as a special trust fund within the state treasury.[4] It is from this Disability Fund that benefits under the program are paid.

An individual is eligible for disability benefits if, during a one-year base period prior to his disability, he has contributed one percent of a minimum income of $300 to the Disability Fund.[5] In the event he suffers a compensable disability, the individual can receive a "weekly benefit amount" of between $25 and $105, depending on the amount he earned during the highest quarter of the

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[2] West's Ann. Un. Ins. Code §§ 3251–3254.

[3] §§ 984, 985, 2901.

[4] § 3001.

[5] § 2652.

base period.[6] Benefits are not paid until the eighth day of disability, unless the employee is hospitalized, in which case benefits commence on the first day of hospitalization.[7] In addition to the "weekly benefit amount," a hospitalized employee is entitled to receive "additional benefits" of $12 per day of hospitalization.[8] "Weekly benefit amounts" for any one disability are payable for 26 weeks so long as the total amount paid does not exceed one-half of the wages received during the base period.[9] "Additional benefits" for any one disability are paid for a maximum of 20 days.[10]

In return for his one-percent contribution to the Disability Fund, the individual employee is insured against the risk of disability stemming from a substantial number of "mental or physical illness[es] and mental or physical injur[ies]." West's Ann. Cal. Un. Ins. Code § 2626. It is not every disabling condition, however, that triggers the obligation to pay benefits under the program. As already noted, for example, any disability of less than eight days' duration is not compensable, except when the employee is hospitalized. Conversely, no benefits are payable for any single disability beyond 26 weeks. Further, disability is not compensable if it results from the individual's court commitment as a dipsomaniac, drug addict, or sexual psychopath.[11] Finally, § 2626 of the Unem-

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[6] § 2655. This provision has been amended, effective July 1, 1974, to provide for a maximum weekly benefit amount of $119.

[7] §§ 2627 (b) and 2802.

[8] § 2801.

[9] § 2653.

[10] § 2801. Section 2606 provides a formula for determining whether a disabling condition that is intermittent is one disability or more than one disability for purposes of applying the limitations in §§ 2653 and 2801 on the maximum amount of benefits payable.

[11] § 2678. Sections 2675–2677 contain various other factors that will disqualify an employee from receiving benefits but that relate to matters other than the nature of the disabling condition.

ployment Insurance Code excludes from coverage certain disabilities that are attributable to pregnancy. It is this provision that is at issue in the present case.

Appellant is the Director of the California Department of Human Resources Development.[11] He is responsible for the administration of the State's disability insurance program. Appellees are four women who have paid sufficient amounts into the Disability Fund to be eligible for benefits under the program. Each of the appellees became pregnant and suffered employment disability as a result of her pregnancy. With respect to three of the appellees, Carolyn Aiello, Augustina Armendariz, and Elizabeth Johnson, the disabilities were attributable to abnormal complications encountered during their pregnancies.[12] The fourth, Jacqueline Jaramillo, experienced a normal pregnancy, which was the sole cause of her disability.

At all times relevant to this case, § 2626 of the Unemployment Insurance Code provided:

> "'Disability' or 'disabled' includes both mental or physical illness and mental or physical injury. An individual shall be deemed disabled in any day in which, because of mental or physical condition, he is unable to perform his regular or customary work. *In no case shall the term 'disability' or 'disabled' include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter.*" (Emphasis added.)

---

[11] Effective July 1, 1974, the Department of Human Resources Development will be renamed the Department of Employment Development. See Unemployment Ins. Code § 301 *et seq.*

[12] Aiello and Johnson suffered ectopic and tubal pregnancies, respectively, which required surgery to terminate the pregnancies. Armendariz suffered a miscarriage.

Appellant construed and applied the final sentence of this statute to preclude the payment of benefits for any disability resulting from pregnancy. As a result, the appellees were ruled ineligible for disability benefits by reason of this provision, and they sued to enjoin its enforcement. The District Court, finding "that the exclusion of pregnancy-related disabilities is not based upon a classification having a rational and substantial relationship to a legitimate state purpose," held that the exclusion was unconstitutional under the Equal Protection Clause. 359 F. Supp., at 801.

Shortly before the District Court's decision in this case, the California Court of Appeal, in a suit brought by a woman who suffered an ectopic pregnancy, held that § 2626 does not bar the payment of benefits on account of disability that results from medical complications arising during pregnancy. *Rentzer* v. *California Unemployment Insurance Appeals Board*, 32 Cal. App. 3d 604 (2d App. Dist., 1973).[14] The state court construed the statute to preclude only the payment of benefits for disability accompanying normal pregnancy.[15] The appel-

[14] In an earlier decision, the Court of Appeal had sustained § 2626 against an Equal Protection challenge by a female employee who had suffered disability as a result of normal pregnancy and delivery. *Clark* v. *California Emp. Stat. Comm.*, 166 Cal. App. 2d 326 (1966).

[15] Section 2626 was later amended, and a new § 2626.2 was added, in order clearly to reflect this interpretation. The two sections now provide as follows:

"§ 2626 'Disability' or 'disabled' includes both mental or physical illness, mental or physical injury, and, to the extent specified in Section 2626.2, pregnancy. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work.

"§ 2626.2 Benefits relating to pregnancy shall be paid under this part only in accordance with the following:

"(a) Disability benefits shall be paid upon a doctor's certification

lant acquiesced in this construction and issued administrative guidelines that exclude only the payment of "maternity benefits—*i. e.*, hospitalization and disability benefits for normal delivery and recuperation.

Although *Rentzer* was decided some 10 days before the District Court's decision in this case, there was apparently no opportunity to call the court's attention to it. The appellant, therefore, asked the court to reconsider its decision in light of the construction that the California Court of Appeal had given to § 2626 in the *Rentzer* case. By a divided vote, the court denied the motion for reconsideration. Although a more definitive ruling would surely have been preferable, we interpret the District Court's denial of the appellant's motion as a determination that its decision was not affected by the limiting construction given to § 2626 in *Rentzer*.

Because of the *Rentzer* decision and the revised administrative guidelines that resulted from it, the appellees Aiello, Armendariz, and Johnson, whose disabilities were attributable to causes other than normal pregnancy and delivery, became entitled to benefits under the disability insurance program, and their claims have since been paid. With respect to appellee Jaramillo, however, whose disability stemmed solely from normal pregnancy and childbirth, § 2626 continues to bar the

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that the claimant is disabled because of an abnormal and involuntary complication of pregnancy, including but not limited to: puerperal infection, eclampsia, cesarian section delivery, ectopic pregnancy, and toxemia.

"(b) Disability benefits shall be paid upon a doctor's certification that a condition possibly arising out of pregnancy would disable the claimant without regard to the pregnancy, including but not limited to: anemia, diabetes, embolism, heart disease, hypertension, phlebitis, phlebothrombosis, pyelonephritis, thrombophlebitis, vaginitis, varicose veins, and venous thrombosis."

These amendments took effect on January 1, 1974.

payment of any benefits. It is evident that only Jaramillo continues to have a live controversy with the appellant as to the validity of § 2626. The claims of the other appellees have been mooted by the change that *Rentzer* worked in the construction and application of that provision. Thus, the issue before the Court on this appeal is whether the California disability insurance program invidiously discriminates against Jaramillo and others similarly situated by not paying insurance benefits for disability that accompanies normal pregnancy and childbirth.

II

It is clear that California intended to establish this benefit system as an insurance program that was to function essentially in accordance with insurance concepts.[16] Since the program was instituted in 1946, it has been totally self-supporting, never drawing on general state revenues to finance disability or hospital benefits. The Disability Fund is wholly supported by the one percent of wages annually contributed by participating employees. At oral argument, counsel for the appellant informed us that in recent years between 90% and 103% of the revenue to the Disability Fund has

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[16] In his message to the state legislature proposing the creation of this program, Governor Earl Warren stated:

"It is not possible for employees to obtain from private insurance companies protection against loss of wages or salary during sickness as adequately or cheaply as the protection could be obtained by diverting their 1% contribution for the support of a Disability Benefits Program."

California Senate Journal, January 23, 1946, p. 229. The California Supreme Court has concluded "that the legislative purpose in providing unemployment disability benefits . . . was to provide an insurance program to pay benefits to individuals who are unemployed because of illness or injury . . . ." *Garcia* v. *Industrial Accident Comm.*, 41 Cal. 2d 689, 692 (1954) (internal quotations omitted).

been paid out in disability and hospital benefits. This history strongly suggests that the one-percent contribution rate, in addition to being easily computable, bears a close and substantial relationship to the level of benefits payable and to the disability risks insured under the program.

Over the years California has demonstrated a strong commitment not to increase the contribution rate above the one-percent level. The State has sought to provide the broadest possible disability protection that would be affordable by all employees, including those with very low incomes. Because any larger percentage or any flat dollar-amount rate of contribution would impose an increasingly regressive levy bearing most heavily upon those with the lowest incomes, the State has resisted any attempt to change the required contribution from the one-percent level. The program is thus structured, in terms of the level of benefits and the risks insured, to maintain the solvency of the Disability Fund at a one-percent annual level of contribution.[17]

In ordering the State to pay benefits for disability accompanying normal pregnancy and delivery, the District Court acknowledged the State's contention "that coverage of these disabilities is so extraordinarily expensive that it would be impossible to maintain a program supported by employee contributions if these disabilities are included." 359 F. Supp., at 798. There is considerable disagreement between the parties with respect to how great the increased costs would actually be, but they

[17] Section 2604 vests the Governor and the appellant with authority to modify the payment of benefits and to increase the waiting time for eligibility if such steps are necessary to forestall insolvency of the Disability Fund. But neither the Governor nor the appellant is authorized to increase the contribution rate under any circumstances.

would clearly be substantial.[18] For purposes of analysis the District Court accepted the State's estimate, which was in excess of $100 million annually, and stated that "it is clear that including these disabilities would not destroy the program. The increased costs could be accommodated quite easily by making reasonable changes in the contribution rate, the maximum benefits allowable, and the other variables affecting the solvency of the program." *Ibid.*

Each of these "variables"—the benefit level deemed appropriate to compensate employee disability, the risks selected to be insured under the program, and the contribution rate chosen to maintain the solvency of the program and at the same time to permit low-income employees to participate with minimal personal sacrifice—represents a policy determination by the State. The essential issue in this case is whether the Equal Protection Clause requires such policies to be sacrificed or compromised in order to finance the payment of benefits to those whose disability is attributable to normal pregnancy and delivery.

We cannot agree that the exclusion of this disability from coverage amounts to invidious discrimination under the Equal Protection Clause. California does not discriminate with respect to the persons or groups who are eligible for disability insurance protection under the program. The classification challenged in this case relates to the asserted under-inclusiveness of the set of risks that the State has selected to insure. Although California

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[18] Appellant's estimate of the increased cost of including normal pregnancy within the insured risks has varied between $120.2 million and $131 million annually, or between a 33% and 36% increase in the present amount of benefits paid under the program. On the other hand, appellee contends that the increased cost would be $48.9 million annually, or a 12% increase over present expenditures.

has created a program to insure most risks of employment disability, it has not chosen to insure all such risks, and this decision is reflected in the level of annual contribution exacted from participating employees. This Court has held that, consistently with the Equal Protection Clause, a State "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. . . ." *Williams* v. *Lee Optical Co.*, 348 U. S. 483, 489; *Jefferson* v. *Hackney*, 406 U. S. 535 (1972). Particularly with respect to social welfare programs, so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point. "[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge* v. *Williams*, 397 U. S. 471, 486–487 (1970).

The District Court suggested that moderate alterations in what it regarded as "variables" of the disability insurance program could be made to accommodate the substantial expense required to include normal pregnancy within the program's protection. The same can be said, however, with respect to the other expensive class of disabilities that are excluded from coverage—short-term disabilities. If the Equal Protection Clause were thought to compel disability payments for normal pregnancy, it is hard to perceive why it would not also compel payments for short-term disabilities suffered by participating employees.[19]

It is evident that a totally comprehensive program would be substantially more costly than the present pro-

[19] The same could be said of disabilities continuing beyond 26 weeks.

gram and would inevitably require state subsidy, a higher rate of employee contribution, a lower scale of benefits for those suffering insured disabilities, or some combination of these measures. There is nothing in the Constitution, however, that requires the State to subordinate or compromise its legitimate interests solely to create a more comprehensive social insurance program than it already has.

The State has a legitimate interest in maintaining the self-supporting nature of its insurance program. Similarly, it has an interest in distributing the available resources in such a way as to keep benefit payments at an adequate level for disabilities that are covered, rather than to cover all disabilities inadequately. Finally, California has a legitimate concern in maintaining the contribution rate at a level that will not unduly burden participating employees, particularly low-income employees who may be most in need of the disability insurance.

These policies provide an objective and wholly noninvidious basis for the State's decision not to create a more comprehensive insurance program than it has. There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program.[20] There is no risk from which men are pro-

[20] The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed* v. *Reed*, 404 U. S. 71, and *Frontiero* v. *Richardson*, 411 U. S. 677, involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed*, *supra*, and *Frontiero*, *supra*. Normal pregnancy is an objectively

tected and women are not. Likewise, there is no risk from which women are protected and men are not.[21]

The appellee simply contends that, although she has received insurance protection equivalent to that provided all other participating employees, she has suffered discrimination because she encountered a risk that was outside the program's protection. For the reasons we have stated, we hold that this contention is not a valid one under the Equal Protection Clause of the Fourteenth Amendment.

The stay heretofore issued by the Court is vacated, and the judgment of the District Court is

Reversed.

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identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.

[21] Indeed, the appellant submitted to the District Court data that indicated that both the annual claim rate and the annual claim cost are greater for women than for men. As the District Court acknowledged, "women contribute 28 per cent of the total disability insurance fund and receive back about 38 per cent of the fund in benefits." 359 F. Supp., at 800. Several *amici curiae* have represented to the Court that they have had a similar experience under private disability insurance programs.

SUPREME COURT OF THE UNITED STATES

No. 73-640

Dwight Geduldig, Etc., Appellant, v. Carolyn Aiello et al	On Appeal from the United States District Court for the Northern District of California.

[June 17, 1974]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

Relying upon *Dandridge* v. *Williams*, 397 U. S. 471 (1970), and *Jefferson* v. *Hackney*, 406 U. S. 535 (1972), the Court today rejects respondents' equal protection claim and upholds the exclusion of pregnancy related disabilities from coverage under California's disability insurance program on the ground that the legislative classification rationally promotes the State's legitimate cost-saving interests in "maintaining the self-supporting nature of its insurance program[,] . . . distributing the available resources in such a way as to keep benefit payments at an adequate level for disabilities that are covered[,] . . . [and] maintaining the contribution rate at a level that will not unduly burden the participating employees. . . ." *Ante*, p. 11. Because I believe that *Reed* v. *Reed*, 404 U. S. 71 (1971), and *Frontiero* v. *Richardson*, 411 U. S. 677 (1973), mandate a stricter standard of scrutiny which the State's classification fails to satisfy, I respectfully dissent.

California's disability insurance program was enacted to supplement the State's unemployment insurance and workmen's compensation programs by providing benefits to wage earners to cushion the economic effects of income loss and medical expenses resulting from sickness or injury. The Legislature's intent in enacting the pro-

gram was expressed clearly in § 2601 of the Unemployment Insurance Code:

> "The purpose of this part is to compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury and to reduce to a minimum the suffering caused by unemployment resulting therefrom. This part shall be construed liberally in aid of its declared purpose to mitigate the evils and burdens which fall on the unemployed and disabled worker and his family."

To achieve the Act's broad humanitarian goals, the Legislature fashioned a pooled-risk disability fund covering all employees at the same rate of contribution,[1] regardless of individual risk.[2] The only requirement that must be satisfied before an employee becomes eligible to receive disability benefits is that the employee must have contributed one percent of a minimum income of $300 during a one year base-period. Unemp. Ins. Code § 2652. The "basic benefits," varying from $25 to $119 per week, depending upon the employee's base-period earnings, begin on the eighth day of disability or on the first day of hospitalization. Unemp. Ins. Code §§ 2655, 2627 (b), 2802. Benefits are payable for a maximum of 26 weeks, but may not exceed one-half

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[1] An employee must contribute one percent of his annual wages, not exceeding a total contribution of $85 per year ($95 for calendar year 1974 and thereafter). Unemp. Ins. Code §§ 2901, 984, 985. The ceiling on wages subject to the one percent contribution rate, of course, introduces a regressive element in the contribution scheme. Perhaps in recognition of this fact, the disability benefits schedule is designed to grant proportionately greater benefits to more poorly paid workers. Unemp. Ins. Code § 2655.

[2] California deliberately decided not to classify employees on the basis of actuarial data. Thus, the contribution rate for a particular group of employees is not tied to that group's predicted rate of disability claims. 350 F. Supp. 792, 800.

of the employee's total base-period earnings. Unemp. Ins. Code § 2653. Finally, compensation is paid for virtually all disabling conditions without regard to cost, voluntariness, uniqueness, predictability, or "normalcy" of the disability.[3] Thus, for example, workers are compensated for costly disabilities such as heart attacks, voluntary disabilities such as cosmetic surgery or sterilization, sex and race unique disabilities such as prostatectomies or sickle-cell anemia, pre-existing conditions inevitably resulting in disability such as degenerative arthritis or cataracts, and "normal" disabilities such as removal of irritating wisdom teeth or other orthodonia.

Despite the Act's broad goals and scope of coverage, compensation is denied for disabilities suffered in connection with a "normal" pregnancy—disabilities suffered only by women. Unemp. Ins. Code §§ 2626, 2626.2. Disabilities caused by pregnancy, however, like other physically disabling conditions covered by the Act, require medical care, often include hospitalization, anesthesia and surgical procedures, and may involve genuine risk to life.[4] Moreover, the economic effects caused by

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[3] While the Act technically excludes from coverage individuals under court commitment for dipsomania, drug addiction, or sexual psychopathy, Unemp. Ins. Code § 2678, the Court was informed by the Deputy Attorney General of California at oral argument that court commitment for such disabilities is "a fairly archaic practice" and that "it would be unrealistic to say that they constitute valid exclusions." Tr. of Oral Arg., at 13.

[4] On March 2, 1974, the American College of Obstetricians and Gynecologists adopted the following Policy Statement on Pregnancy-related Disabilities:

"Pregnancy is a physiological process. All pregnant patients, however, have a variable degree of disability on an individual basis, as indicated below, during which time they are unable to perform their usual activities. (1) In an uncomplicated pregnancy, disability occurs near the termination of pregnancy, during labor, de-

pregnancy related disabilities are functionally indistinguishable from the effects caused by any other disability: wages are lost due to a physical inability to work, and medical expenses are incurred for the delivery of the child and for post-partum care.[8] In my view, by singling out for less favorable treatment a gender-linked disability peculiar to women, the State has created a double standard for disability compensation: a limitation is imposed upon the disabilities for which women workers may recover, while men receive full compensation for all disabilities suffered, including those that effect only or primarily their sex, such as prostatectomies, circumcission, hemophilia and gout. In effect, one set of rules is ap-

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livery and the peurperium. The process of labor and peurperium is disabling in itself. The usual duration of such disability is approximately six to eight weeks. (2) Complications of a pregnancy may occur which give rise to other disability. Examples of such complications include toxemia, infection, hemorrhage, ectopic pregnancy and abortion. (3) A woman with preexisting disease which in itself is not disabling, may become disabled with the addition of pregnancy. Certain patients with heart disease, diabetes, hypertensive cardiovascular disease, renal disease, and other systemic conditions may become disabled during their pregnancy because of the adverse effect pregnancy has upon these conditions.

"The onset, termination and cause of the disability, related to pregnancy, can only be determined by a physician."

See Brief for Appellees, at 59–60.

[8] Nearly two-thirds of all women who work do so of necessity: either they are unmarried or their husbands earn less than $7,000 per year. See United States Department of Labor, Women's Bureau, Why Women Work (Rev. ed. 1972); United States Department of Labor, Employment Standards Administration, The Myth and Reality (1973). Moreover, this Court recognized in *Kahn* v. *Shevin*, — U. S. —, — (1974), that "data compiled by the Women's Bureau of the United States Department of Labor shows that in 1972 women working full time had a median income which was only 57.9% of the male median—a figure actually six points lower than had been achieved in 1955."

plied to females and another to males. Such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination.

The same conclusion has been reached by the Equal Employment Opportunity Commission, the federal agency charged with enforcement of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U. S. C. (Supp. II) § 2000e *et seq.*, which prohibits employment discrimination on the basis of sex. In guidelines issued pursuant to Title VII and designed to prohibit the disparate treatment of pregnancy disabilities in the employment context,[8] the EEOC has declared that:

> "Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving such as the commencement and duration of sick leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the

[8] "The Commission carefully scrutinized both the employer practices and their crucial impact on women for a substantial period of time and then issued its Guidelines after it became increasingly apparent that systematic and pervasive discrimination against women was frequently found in employers' denial of employment opportunity and benefits to women on the basis of the childbearing role, performed solely by women." Brief of the United States Equal Employment Opportunity Commission as *amicus curiae*, at 10.

same terms and conditions as they are applied to other temporary disabilities." 29 CFR § 1604.10 (b) (1973).[1]

In the past, when a legislative classification has turned on gender, the Court has justifiably applied a standard of judicial scrutiny more strict than that generally accorded economic or social welfare programs. Compare *Reed* v. *Reed*, *supra*, and *Frontiero* v. *Richardson*, *supra*, with *Dandridge* v. *Williams*, *supra*, and *Jefferson* v. *Hackney*, *supra*. Yet, by its decision today, the Court appears willing to abandon that higher standard of review without satisfactorily explaining what differentiates the gender-based classification employed in this case from those found unconstitutional in *Reed* and *Frontiero*. The Court's decision threatens to return men and women to a time when "traditional" equal protection analysis sustained legislative classifications that treated differently members of a particular sex solely because of their sex. See, *e. g.*, *Muller* v. *Oregon*, 208 U. S. 412 (1908); *Goesaert* v. *Cleary*, 335 U. S. 464 (1948); *Hoyt* v. *Florida*, 368 U. S. 57 (1961).

I cannot join the Court's apparent retreat. I continue to adhere to my view that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." *Frontiero* v. *Richardson*, *supra*, 411 U. S., at 688. When, as in this case, the State employs a legislative classification that distinguishes between beneficiaries solely by reference to gender-linked disability risks, "[t]he Court is not . . . free

[1] See also the proposed "Sex Discrimination Guidelines" issued by the Department of Labor pursuant to Executive Order 11246, virtually adopting the EEOC's pregnancy related disabilities guideline. 38 Fed. Reg. 35336, 35338 (Dec. 27, 1973) (proposed § 60-20 (h) (2), 41 CFR).

to sustain the statute on the ground that it rationally promotes legitimate governmental interests; rather, such suspect classifications can be sustained only when the State bears the burden of demonstrating that the challenged legislation serves overriding or compelling interests that cannot be achieved either by a more carefully tailored legislative classification or by the use of feasible, less drastic means." *Kahn* v. *Shevin*, — U. S. —, — (1974) (BRENNAN, J., dissenting).

The State has clearly failed to meet that burden in the present case. The essence of the State's justification for excluding disabilities caused by a normal pregnancy from its disability compensation scheme is that covering such disabilities would be too costly. To be sure, as presently funded, inclusion of normal pregnancies "would be substantially more costly than the present program." [*] *Ante*, p. 10. The present level of benefits for insured disabilities could not be maintained without increasing the employee contribution rate, raising or lifting the yearly contribution ceiling, or securing State subsidies. But whatever role such monetary considerations may play in traditional equal protection analysis, the State's interest in preserving the fiscal integrity of its disability insurance program simply cannot render the State's use of a suspect classification constitutional. For while "a State has a valid interest in preserving the fiscal integrity of its programs[,] . . . a State may not accomplish such a

[*] However, "[i]t is important to remember, especially in the cost context, that if an employee is being paid his regular pay while disabled, he cannot collect disability pay. Therefore, it follows that any alleged financial burden on the State will be greatly diminished when employers adhere to Title VII and treat pregnancy-related disabilities the same as other disabilities by allowing women to use accumulated sick leave and possibly annual leave as well." Brief of the United States Equal Employment Commission as *amicus curiae*, at 21 n. 12.

purpose by invidious distinctions between classes of its citizens. . . . The saving of welfare costs cannot justify an otherwise invidious classification." *Shapiro* v. *Thompson*, 394 U. S. 618, 633 (1969). Thus, when a statutory classification is subject to strict judicial scrutiny, the State "must do more than show that denying [benefits to the excluded class] saves money." *Memorial Hospital* v. *Maricopa County*, — U. S. —, — (1974). See also *Graham* v. *Richardson*, 403 U. S. 365, 374–375 (1971).*

Moreover, California's legitimate interest in fiscal integrity could easily have been achieved through a variety of less drastic, sexually neutral means. As the District Court observed:

> "Even using [the State's] estimate of the cost of expanding the program to include pregnancy-related disabilities, however, it is clear that including these disabilities would not destroy the program. The increased costs could be accommodated quite easily by making reasonable changes in the contribution rate, the maximum benefits allowable, and the other variables affecting the solvency of the program. For example, the entire cost increase estimated by defendant could be met by requiring workers to contribute an additional amount of approximately .364 percent of their salary and increasing the maximum annual contribution to about $119." 359 F. Supp. 792, 798.

I would therefore affirm the judgment of the District Court.

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* Similarly, under the EEOC's Guidelines on Discrimination Because of Sex, "It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other." 29 CFR § 1604.9 (e).